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CONVEYANCER'S NOTEBOOK

SOLICITOR'S DUTY IN RELATION TO WILLS

We draw attention to *Hall* v. *Meyrick* [1957] 2 W.L.R. 458 (noted *post*, p. 248); the whole judgment of Ashworth J. deserves careful perusal. The defendant solicitor apparently did not realise that the general rule is that marriage revokes a will, but ignorance even of a fairly elementary principle is not a wrong unless the client suffers. The testator in the case, having won some £25,000 in the Irish Sweep, made a will leaving it all to the plaintiff with whom he was very friendly and whom he subsequently married. As a result of the marriage he died intestate and the plaintiff, instead of taking the whole estate, took her rights on intestacy, which were substantially less. Now, the testator and his estate lost nothing at all, so that the plaintiff, if she was to succeed, had to allege a duty to herself which was broken. Accordingly, she alleged that when she and the testator went to see the defendant they gave instructions jointly, but the learned judge rejected this contention. She also alleged a sort of general retainer, contending that the defendant was liable, when he heard of the marriage, to advise on its effect. This contention was equally firmly rejected. To have accepted it would make a solicitor's burden intolerable. Of course, a solicitor tries to look after his client's affairs generally, but it is quite a different thing to say that he is under an obligation to do so.

When the plaintiff's leading counsel was on his final address, he asked leave to amend his statement of claim so as to allege separate retainers, and this gave rise to one of the ironies of the case. A claim based on the original instructions was clearly statute-barred, but the defendant's counsel, although resisting the

amendment, did not resist it on that ground, and leave to amend was granted, subject to the defendant's counsel's right to make further submissions when he had seen and considered the amendment. When the hearing was resumed it was submitted that the amendment should not be allowed because the claim was statute-barred, but, rather like a game of snap, the learned judge held that the point was taken too late. It does not appear from the report why the point was not taken when leave to amend was originally applied for, but it seems rather hard that the defendant should be held liable in negligence when there was a clear answer which his counsel did not put forward in time. We do not suggest that the defendant's counsel was in any way negligent—he may have been acting on instructions—but it is an oddity that, while the bench and bar expect a high standard of care from solicitors, the bar itself is legally irresponsible: if a client employs a solicitor to conduct a case personally in a county court, he is entitled to a standard of care which he is not entitled to if he employs counsel. (Is a solicitor in breach of duty if he fails to warn his client of this?)

The learned judge held that the defendant was liable to the plaintiff for not advising her when she instructed him to draw up her will that the *testator's* will would be revoked on marriage. This, if we may say so with respect, is an extraordinary proposition: A asks a solicitor to draw a will in favour of B; the solicitor is under an obligation to tell A what the effect of B's will is. In the instant case, a few years later, the plaintiff returned to the defendant to make a fresh will entirely cutting out the testator. Was the solicitor under an obligation to tell the testator of this? We have little doubt that the solicitor would be held to have committed a serious breach of confidence had he done so.

In *Griffiths* v. *Evans* [1953] 1 W.L.R. 1424, the Court of Appeal rejected the view that, when a client consults a solicitor, the latter must not merely advise on what he is asked to but must deal with any analogous matters that he thinks might assist the client. Why a solicitor, when asked to draw up a will, should be expected to advise on the will of someone else we do not know. What we do know is the reaction of the client—and of the taxing office—if he sought to charge for such advice.

Flats and Road Charges

Stewart v. *Greenock Corporation* (1956) 73 Sh.Ct.Rep. 29 may be of assistance in England. A building consisting of two flats was on the corner of F Street and B Street. The entrance to the upper flat was from F Street. The front garden abutted on B Street

and belonged to the lower flat. The local authority sought to make the upper flat owner contribute to the making-up of B Street. The court held that he was not liable as his premises did not front or abut on B Street.

In England the liability of the upper flat owner would depend on which Act the local authority proceeded under. If the street is made up under the Private Street Works Act, 1892, then premises which do not front, adjoin or abut on the street may have to contribute if the authority think it just that they should do so and access is obtained to them "through a court, passage or otherwise" (s. 10). If the street is made up under the Public Health Act, 1875, s. 150, only the owners or occupiers of premises fronting, adjoining or abutting on the street can be compelled to contribute.

Schedule A Tax on Flats

We suggested earlier this year (*ante*, p. 5) that the law as laid down by Danckwerts J. in *Gatehouse* v. *Vise* should be changed as quickly as possible. The decision has been upheld by the Court of Appeal, but apparently the Government had already made up its mind to alter the law, for in the Finance Bill, clause 15, it is provided that, where a distinct part of a house or building is separately occupied by a tenant of the landlord of the entire house or building, then for the purposes of Schedule A tax that part may be treated as a distinct house or building, and shall be so treated if, on an appeal by the landlord against an assessment made on him, it is shown that the tenant holds that part from the landlord under a letting for a year or more at a rent less than the net annual value. For this purpose occupation by a sub-tenant is treated as occupation by the tenant.

Although this method of legislating—adding another patch to the tattered garment—is to be deplored, the result is satisfactory. Not only does it deal with leases to be granted in the future, but when a lease has already been granted, possibly on the faith of the Government statement of practice, the landlord may appeal against any assessment on him.

Under the clause the landlord will remain liable to be assessed on any part of the building not treated as a distinct house or building.

THE ENFORCEMENT OF PLANNING CONTROL

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I. Control Over Unauthorised Development

The Town and Country Planning Act, 1947 (*a*), provides, in section 12, that there shall be no development of land without prior grant of planning permission. This permission may be granted automatically under Article 3 of the Town and Country Planning General Development Order, 1950 (*b*), in respect of what is called "permitted development" (*i.e.*, development mentioned in one or other of the twenty-two Classes of development specified in the First Schedule to the Order) or it may be granted expressly by a local planning authority as a result of a formal application in that behalf made by the prospective developer to the local planning authority (s. 14).

Development which takes place without planning permission, or in breach of conditions subject to which such permission has been granted, is unauthorised development as far as the 1947 Act is concerned and against any unauthorised development the local planning authority may invoke the enforcement procedure set up in sections 23 and 24 of the Act. These are sections which put teeth into the control of unauthorised development. They have proved, since the 1947 Act came into operation, to be a fertile cause of argument and have probably produced more case law (relating, curiously enough, almost always to caravans and camping grounds) than any other two sections of the Act. In this article an attempt is made to examine these two sections in the light of the decisions of the courts upon them.

Section 23 (as amended by the Town and Country Planning (Amendment) Act, 1951) and section 24 of the 1947 Act are in the following terms:—

> "23.—(1) If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, or that any conditions subject to which such permission was granted in

(*a*) In this article references to sections relate to sections of the Town and Country Planning Act, 1947, unless otherwise stated.
(*b*) S.I. 1950, No. 728.

respect of any development have not been complied with, then, subject to any directions given by the Minister, the local planning authority may within four years of such development being carried out [or, in case of non-compliance with a condition, within four years after the date of the alleged failure to comply with it], if they consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section.

" (2) Any notice served under this section (hereinafter called an ' enforcement notice ') shall specify the development which is alleged to have been carried out without the grant of such permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with, and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its condition before the development took place, or for securing compliance with the conditions, as the case may be; and in particular any such notice may, for the purpose aforesaid, require the demolition or alteration of any buildings or works, the discontinuance of any use of land, or the carrying out on land of any building or other operations.

" (3) Subject to the provisions of the next following subsection, an enforcement notice shall take effect at the expiration of such period (not being less than twenty-eight days after the service thereof) as may be specified therein:

Provided that—

(a) if within the period aforesaid an application is made to the local planning authority under this Part of this Act for permission for the retention on the land of any buildings or works, or for the continuance of any use of the land, to which the enforcement notice relates, the notice shall be of no effect pending the final determination of that application, and if such permission as aforesaid is granted on that application, the notice shall not take effect;

(b) if within the period aforesaid an appeal is made to the court under the following provisions of this section by a person on whom the enforcement notice was served, the notice shall be of no effect pending the final determination or withdrawal of the appeal.

" (4) If any person on whom an enforcement notice is served under this section is aggrieved by the notice, he may, at any time within the period mentioned in the last foregoing subsection, appeal against the notice to a court of summary jurisdiction for the petty sessional division or place within which the land to which the notice relates is situated; and on any such appeal the court—

(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates;

(b) if not so satisfied, but satisfied that the requirements of the notice exceed what is necessary for restoring land to its condition before the development took place, or for securing compliance with the conditions, as the case may be, shall vary the notice accordingly;

(c) in any other case shall dismiss the appeal:

Provided that where the enforcement notice is varied or the appeal is dismissed, then, without prejudice to the provisions of paragraph (a) of the proviso to subsection (3) of this section, the court may, if they think fit, direct that the enforcement notice shall not come into force until such date (not being later than twenty-eight days from the determination of the appeal) as the court think fit.

" (5) Any person aggrieved by a decision of a court of summary jurisdiction under the last foregoing subsection may appeal against that decision to a court of quarter sessions.

" 24.—(1) If, within the period specified in an enforcement notice, or within such extended period as the local planning authority may allow, any steps required by the notice to be taken (other than the discontinuance of any use of land) have not been taken, the local planning authority may enter on the land and take those steps, and may recover as a simple contract debt in any court of competent jurisdiction from the person who is then the owner of the land any expenses reasonably incurred by them in that behalf; and if that person, having been entitled to appeal to the court under the last foregoing section, failed to make such an appeal, he shall not be entitled in proceedings under this subsection to dispute the validity of the action taken by the local planning authority

upon any ground which could have been raised by such an appeal.

" (2) Any expenses incurred by the owner or occupier of any land for the purpose of complying with an enforcement notice served under the last foregoing section in respect of any development, and any sums paid by the owner of any land under the foregoing subsection in respect of the expenses of the local planning authority in taking steps required to be taken by such a notice, shall be deemed to be incurred or paid for the use at the request of the person by whom the development was carried out.

" (3) Where, by virtue of an enforcement notice, any use of land is required to be discontinued, or any conditions are required to be complied with in respect of any use of land or in respect of the carrying out of any operations thereon, then if any person, without the grant of permission in that behalf under this Part of this Act, uses the land or causes or permits the land to be used, or carries out or causes or permits to be carried out those operations, in contravention of the notice, he shall be guilty of an offence and liable on summary conviction to a fine not exceeding fifty pounds; and if the use is continued after the conviction, he shall be guilty of a further offence and liable on summary conviction to a fine not exceeding twenty pounds for every day on which the use so continued.

" (4) Nothing in this Part of this Act shall be construed as requiring permission to be obtained thereunder for the use of any land for the purpose for which it could lawfully have been used under this Part of this Act if the development in respect of which an enforcement notice is served under the last foregoing section had not been carried out.

" (5) Provision may be made by regulations under this Act for applying in relation to steps required to be taken by an enforcement notice under the last foregoing section all or any of the following provisions of the Public Health Act, 1936, that is to say—

(a) section two hundred and seventy-six (which empowers local authorities to sell materials removed in executing works under that Act, subject to accounting for the proceeds of sale);

(b) section two hundred and eighty-nine (which confers power to require the occupier of any premises to permit works to be executed by the owner of the premises);

(c) section two hundred and ninety-two (which confers

power on local authorities to include a sum in respect of establishment charges in their expenses in executing works); and

(d) section two hundred and ninety-four (which limits the liability of persons holding premises as agents or trustees in respect of the expenses recoverable under that Act);

subject to such adaptations and modifications as may be specified in the regulations, and any such regulations may provide for the charging on the land of any expenses recoverable by a local authority under this section."

II. Drafting an Enforcement Notice

An enforcement notice can only impinge upon unauthorised development and, accordingly, a local planning authority, before serving such a notice, must satisfy itself firstly, that that which it complains of *is* in law development under the 1947 Act; and, secondly, that the requisite planning permission for the development does not in fact exist. (As to what is, and what is not, development under the 1947 Act, reference should be made to section 12 of the Act and to the Town and Country Planning (Use Classes) Order, 1950 (*c*). In the case of development which took place before July 1, 1948—the "appointed day" for the coming into operation of the 1947 Act—reference should be made to sections 75 and 76.) Once it is satisfied on both of the two foregoing points, the local planning authority may proceed to draft the enforcement notice.

The 1947 Act does not prescribe any particular form for an enforcement notice but certain things are clear. In the first place an enforcement notice *must* (s. 23 (2)) specify:—

either the development which has been carried out without planning permission;

or the matters in respect of which conditions, subject to which planning permission was granted, have not been complied with.

In *East Riding County Council* v. *Park Estate (Bridlington), Ltd.* (*d*) the enforcement notice failed because it did not sufficiently specify the above matters. In this case Lord Evershed declared (*e*):

"It is, in my opinion, clear from the language [of section 23 (2)] which I have quoted that it is not sufficient

(*c*) S.I. 1950, No. 1131.
(*d*) [1956] 3 W.L.R. 312; (1956) 6 P. & C.R. 231.
(*e*) [1956] 3 W.L.R. at p. 329.

for the planning authority in an enforcement notice merely to denote the buildings or other matters of which they complain, and then to require that such buildings be removed or the matters complained of be remedied. The notice must also draw specific attention to the grounds of complaint: that is, it must allege as regards any buildings or other matters of complaint either that they constitute development for which no permission has been granted, or (as the case may be) that they constitute or have involved non-compliance with conditions imposed, when the permission was given. So much is, in my judgment, the inescapable effect of . . . section 23 (2) of the Act."

In this case it had been submitted that an enforcement notice couched in general terms involved no real hardship to the recipient, whereas a requirement of greater particularity in the notice might impose real hardship on the planning authority. On this Lord Morton of Henryton (*f*) said:

"My Lords, I cannot accept this submission . . . these two sections [ss. 23 and 75 of the 1947 Act] confer wide power upon the authority, and the exercise of these powers may involve very great loss to the recipient of the notice. It is not surprising if the legislature imposes upon the authority the duty of telling the recipient plainly what is the case which he has to meet."

In the same vein Viscount Simonds said (*g*):

"It was, in the first place, contended that the Act of 1947 was highly technical and, as it encroached on private rights, the court must insist on strict and rigid adherence to formalities. This, as general proposition, commands assent and not the less because disregard of an enforcement notice is an offence involving sufficiently serious penal consequences."

In specifying the development which is alleged to be unauthorised the draughtsman of an enforcement notice will remember that section 12 (2) divides development into two categories, namely,

(a) the carrying out of an operation in, on, over or under, land (*e.g.*, a building, engineering or mining operation); and

(b) the making of a material change in the use of land.

Lack of attention to this distinction produced a vagueness which proved fatal to the enforcement notice in *Remnant* v. *Harrow Urban District Council* (*h*).

(*f*) *Ibid.*, p. 322.
(*g*) *Ibid.*, p. 316.
(*h*) (1952) 3 P. & C.R. 253.

Where the development complained of by the local planning authority took place before the coming into operation of the 1947 Act, the enforcement notice must refer not only to section 23 of the 1947 Act, but also to section 75 with relates to development existing on July 1, 1948, and which contravenes previous planning control. If, in such a case, the enforcement does not do this, the notice will fail as in *Lincolnshire (Parts of Lindsay) County Council* v. *Wallace Holiday Camp, Ltd. and Others* (*i*) in which case Lord Goddard C.J. said (*j*):

> "A number of Acts nowadays give local authorities power to serve notices in respect of various matters, and this court has on more than one occasion recently called attention to the necessity of these notices being specific and carefully drawn, strictly following the Act so that persons affected by the notice may know exactly what is complained of and what they are required to do."

In *Keats* v. *London County Council* (*k*) the enforcement notice specified the development which was begun without permission as:

> "Beginning the use of the land described . . . for the purpose for which the same is now used namely as an industrial building within the meanings of the Town and Country Planning (Use Classes) Order, 1948, and the Town and Country Planning (Use Classes) Order, 1950."

It was held that the notice was not too vague since it stated clearly that the complaint was made with regard to the current user at the date when the notice was served.

In *W. S. Wright, Ltd.* v. *Bromley Corporation* (*l*) the development complained of constituted the deposit of refuse and waste materials on land which had been excavated for gravel and sand, and the enforcement notice required this development to cease and the land to be tidied up to the reasonable satisfaction of the local authority. There was some argument whether, in the circumstances, the deposit of the refuse did in law constitute development within the 1947 Act, having regard to the provisions of section 12 (2) (e) and (3) (b) of the Act. If it did amount to development, the next question was whether it required the grant of express planning permission having regard to section 12 (5) (a) and Class VI or Class VII of the classes of development which are accorded automatic planning permission under Article 3 of the Town and Country Planning General Development Order,

(*i*) [1953] 2 Q.B. 178; 3 P. & C.R. 414.
(*j*) 3 P. & C.R. at p. 415.
(*k*) [1954] 1 W.L.R. 1357; 5 P. & C.R. 1.
(*l*) (1950) 1 P. & C.R. 302.

1950. It was held that the deposit of the refuse and waste materials did constitute development for which planning permission was required but that the requirement of the enforcement notice was so indefinite that it would exceed that which was necessary to restore the land to its condition before the development took place, and the enforcement notice was accordingly varied.

Having adequately specified the development of which complaint is made, or, as the case may be, the matters in respect of which planning conditions have not been complied with, the enforcement notice may proceed to specify (s. 23 (2)) the steps requisite to remedy the state of affairs complained of and to bring this about the notice may require the demolition or alteration of buildings, the discontinuance of any use of land, or the carrying out of building or other operations on land.

The taking of the steps called for by an enforcement notice will require time, and, accordingly, the notice must specify the period (the length of which will depend on what has to be done to comply with the notice) within which the land is to be restored to its condition before development took place or, as the case may be, the planning conditions are to be complied with (s. 23 (2)). But an enforcement notice must also (s. 23 (3)) specify the period (not to be less than twenty-eight days after the service of the notice) at the end of which the notice is to take effect. The notice must thus specify two periods and it is best for the period during which steps are to be taken to comply with the notice not to commence until the date when the notice is declared to come into operation.

If the enforcement notice fails sufficiently to indicate these two separate and distinct periods of time it will be invalid as was shown in *Burgess* v. *Jarvis and Sevenoaks R.D.C.* (*m*), where only one period of time was specified. This case was followed in *Mead* v. *Chelmsford R.D.C.* (*n*), in *Swallow & Pearson* v. *Middlesex County Council* (*o*), and in *Godstone R.D.C.* v. *Brazil* (*p*). In *Wilkinson's Executors* v. *Leeds Corporation* (*q*) the enforcement notice called upon the recipients to cease a contravening use by a certain date. The notice did not *in terms* specify a date upon which it was to take effect but it did inform the recipients that, if aggrieved by the terms of the notice, they might appeal within a period of twenty-eight days from the service of the notice. On this it was held that the notice was valid since it was clear that it did not

(*m*) [1952] 2 Q.B. 41; 2 P. & C.R. 377.
(*n*) [1953] 1 Q.B. 32; 3 P. & C.R. 239.
(*o*) [1953] 1 W.L.R. 422; 3 P. & C.R. 314.
(*p*) [1953] 1 W.L.R. 1102; 4 P. & C.R. 1.
(*q*) (1952) 3 P. & C.R. 222.

take effect for the period of twenty-eight days during which the recipients could appeal to a court of summary jurisdiction or apply to the local planning authority for planning permission.

III. Service of an Enforcement Notice

Having drafted the enforcement notice the next step is to serve it. The local planning authority may do this (under section 21 (1), as amended by section 2 of the Town and Country Planning (Amendment) Act, 1951) within four years of the carrying out of the development or, in the case of non-compliance with a planning condition, within four years after the date of failure to comply with it. (In the case of contravening development existing when the 1947 Act came into full operation on July 1, 1948, the final date for the service of any enforcement notice was, under section 75 (1), July 1, 1951. Thus the opportunity of taking action under section 75 has now gone.)

The enforcement notice is served on the owner and on the occupier of the land affected. "Owner" is defined in section 119 (1), while section 105 gives details as to the method of serving the notice, and under section 106 a local authority can require (under the sanction of a £5 penalty) the occupier of premises and certain other persons to give information as to the ownership of premises for the purpose of enabling the authority to serve a notice on the owner. Under section 103 (1) (c) a local authority may enter upon land for the purpose of surveying it in connection with the service of an enforcement notice.

IV. The Taking Effect of an Enforcement Notice

Subject to the lodging of an appeal against an enforcement notice, the notice will take effect at the expiration of the period (which must not be less than twenty-eight days) specified in the notice (s. 23 (3)), but if, during that period, application is made for planning permission to retain buildings or works, or to continue a use of land (these being the matters objected to in the enforcement notice), the notice is of no effect pending the final determination of the application. If the application is acceded to and planning permission is granted, then the notice will not take effect (s. 23 (3) (a)).

If the recipient of an enforcement notice which in form does not comply with the requirements of section 23 (and which is, accordingly, to that extent an invalid notice) nevertheless applies, as mentioned in the previous paragraph, for planning permission for the development covered by the notice and fails to get it,

and thereupon appeals to the Minister of Housing and Local Government under section 16 and fails again to get planning permission, he is not thereby estopped from challenging the validity of the notice in subsequent proceedings. This was so held in *Swallow & Pearson* v. *Middlesex County Council* (*r*).

When an enforcement notice has come into operation it is registrable as a local land charge in pursuance of rule 3 of the Local Land Charges (Amendment) Rules, 1948 (*s*).

V. Appealing Against an Enforcement Notice

A person aggrieved by the service upon him of an enforcement notice may appeal against it to a court of summary jurisdiction (s. 23 (4)), and there is a right of further appeal to quarter sessions (s. 23 (5)).

It is to be emphasised that this right of appeal is a narrow one and that on any such appeal the court of summary jurisdiction has limited powers only. Indeed, the court *must dismiss the appeal* (s. 23 (4) (c)) in every case except when the court is satisfied:—

either (a) that planning permission for the development of which complaint is made has been granted or was not needed or, as the case may be, that the relevant planning conditions have been complied with, and if so satisfied the court *must quash the notice* (s. 23 (4) (a));

or (b) that the requirements of the enforcement notice exceed what is necessary in the circumstances, in which case the court *must vary the notice* accordingly (s. 23 (4) (b)).

To put the matter another way, and to quote Lord Goddard C.J. in *Mead* v. *Chelmsford R.D.C.* (*t*), a person appealing against an enforcement notice under section 23 (4) can say three things only, and these are:—

> "'This notice ought not to have been served upon me because I did not require [planning] permission,' or 'I have carried out the conditions which were in the notice,' or 'This notice exceeds what is reasonable for me to be called upon to do.'"

If a court of summary jurisdiction varies an enforcement notice or dismisses an appeal against the notice, it may direct that the notice shall not become effective until such date (not being later

(*r*) [1953] 1 W.L.R. 422; 3 P. & C.R. 314.
(*s*) S.I. 1948, No. 1283.
(*t*) [1953] 1 Q.B. 32; 3 P. & C.R. 239.

than twenty-eight days from the determination of the appeal) as it thinks fit (s. 23 (4) proviso).

The strict limitation on the powers of a court of summary jurisdiction when acting under section 23 (4) is further illustrated in *Kilby* v. *Bromsgrove R.D.C.* (*u*), and in *Brookes* v. *Flintshire County Council* (*a*). The latter case related to the use of agricultural land as a camping site for caravans and the court of summary jurisdiction, acting under section 23 (4) (b), varied the enforcement notice. It was held that the justices when acting under this section were obliged to confine the requirements of the notice to what was necessary to restore the land in question to its condition before development took place, and that whilst the justices had a duty to preserve such land for use partly for agriculture and partly for camping, this could be done by delineating the particular portion of the land which was to be used as a camping site *without specifying the precise number of caravans to be accommodated thereon* and that the justices had gone too far in so doing.

In view of the fact that, under the provisions of section 23 (4), the grounds on which an enforcement notice may be appealed against by the recipient of the notice are severely limited, the question has arisen whether, if the recipient never made an appeal under section 23 (4), he could, in civil proceedings against him under section 24 (1), or in criminal proceedings against him under section 24 (3), take points against the notice which he might have taken in an appeal under section 23 (4) had he lodged such an appeal. On this matter it was held in *Perrins* v. *Perrins* (*b*) that, whether or not an allegation in the enforcement notice that development has taken place since July 1, 1948, was correct, as the defendant had not appealed against the notice, the notice became effective and the facts which it alleged could not thereafter be challenged, for, by section 24 (1), the person sued by a local authority for expenses incurred by the authority in demolition work undertaken to secure compliance with an enforcement notice, may not dispute the validity of the authority's action on any ground which he could have raised in an appeal under section 23, and it would be absurd that, being so debarred, such a person should still be entitled, on his being prosecuted under section 24 (3), to challenge the validity of the order under which the authority had effected the demolition. In this case Streatfeild J. said (*c*):

(*u*) (1951) 2 P. & C.R. 113.
(*a*) (1956) 6 P. & C.R. 140.
(*b*) [1951] 2 K.B. 414; 1 P. & C.R. 457.
(*c*) 1 P. & C.R. at p. 462.

"In my view, as section 23 contains specific machinery for obtaining either the cancellation or the variation of the enforcement notice, it is not open to the person who is subsequently prosecuted for failing to carry out something required by the notice to question its validity when he has let pass the opportunity of challenging it given by section 23. Having done that, he has no defence to a prosecution under section 24 (3)."

The effect of *Perrins* v. *Perrins* must not be exaggerated for in *Francis* v. *Yiewsley and West Drayton U.D.C.* (*d*) failure to appeal under section 23 did not act as a bar to subsequent action by the recipient of an enforcement notice for a declaration that the notice was invalid, and *Perrins'* case was distinguished, McNair J. observing (*e*):

"Lord Goddard C.J. said [in *Perrins'* case]: 'Whether the corporation were right or wrong in the view they took here, it seems to me that the Act provides that if a planning authority choose to serve an enforcement notice and that notice is not challenged within twenty-eight days, it becomes effective.' It must be borne in mind, however, that the Divisional Court was there dealing only with the question whether the court of summary jurisdiction were right or wrong in refusing to convict the respondent; that judgment must, therefore, be read subject to the limitation that it is only dealing with the defences which are open to a recipient in a court of summary jurisdiction. That is a different question from that which is before me here."

The position may be summarised by quoting Lord Cohen in *East Riding County Council* v. *Park Estate (Bridlington) Ltd.* (*f*):

"I pause here to observe that it has been held, and I think rightly held, (1) that the court of summary jurisdiction can only quash the enforcement order on proof of one or other of the matters mentioned in section 23 (4) (a); (2) that if the notice is defective in respects not there mentioned, the magistrate cannot quash the conviction (*sic*) but on any proceedings to enforce an alleged breach of planning control the accused may plead that the notice was bad and will not be prejudiced by the fact that it had not been quashed. See *Mead* v. *Chelmsford Rural District Council* (*g*)."

(*d*) [1957] 2 W.L.R. 627; [1957] J.P.L. 351.
(*e*) [1957] 2 W.L.R. at p. 634.
(*f*) [1956] 3 W.L.R. 312; 6 P. & C.R. 231.
(*g*) [1953] 1 Q.B. 32; 3 P. & C.R. 239.

So far as planning conditions involving the vexed question of the temporary or intermittent use of land are concerned, it may be noted that in *Postill* v. *East Riding County Council* (*h*) planning permission was granted for the use of a field as a site for a circus for the period July 20 to September 7, 1952, subject to the condition that the use thereby authorised should be discontinued at the expiration of the period ending September 7, 1952. Performances of the circus ceased on September 6, 1952 and the circus left the field during the following week. In 1953, 1954, and 1955 the field was again used as a site for a circus. It was held that the aforesaid condition was complied with when the use of the field for a circus was discontinued on September 7, 1952. There was a distinction between a continuous user and a discontinuance followed by a resumption or repetition of user for the same purpose after a substantial interval of time, and the resumption in 1953 (and in subsequent years) after ten months' interval was not a continuance of the same user as in 1952. There was, therefore, no breach of the aforesaid planning condition and the local authority had no power to serve an enforcement notice.

In *Davis* v. *Miller* (*i*) the planning authority on August 1, 1952, granted to the occupier of land planning permission for the use of the land as a car park subject to the condition that such use was to be discontinued by September 27, 1953. On September 14, 1952, the occupier appealed to the Minister of Housing and Local Government under section 16 of the 1947 Act against the condition, but asked for consideration of his appeal to be postponed pending negotiations with the planning authority. These negotiations failed, the period allowed by the condition expired, and on November 9, 1953, the authority served an enforcement notice requiring the discontinuance of the use of the land as a car park. The occupier thereupon requested the Minister to hear his appeal, and on April 20, 1954, the Minister, after a local inquiry, dismissed the appeal. The occupier continued to use the land for car parking. It was held that there was nothing in the 1947 Act which limited the legal right of the planning authority to serve an enforcement notice pending the hearing of an appeal by the Minister, and the notice was valid.

VI. Action After Enforcement Notice Becomes Effective

When an enforcement notice (other than a notice relating to the discontinuance of a use) has become effective, the local planning

(*h*) [1956] 2 Q.B. 386; 6 P. & C.R. 400.
(*i*) [1956] 1 W.L.R. 1013; 6 P. & C.R. 410.

authority, in the event of the notice not being complied with, may enter on land and do what is requisite to secure compliance with the notice recovering the expenses of so doing as a simple contract debt from the person who is then the owner of the land (s. 24 (1)) who in turn can recover such expenses from the person who carried out the contravening development (s. 24 (2)). In any civil proceedings taken by a local authority to recover such expenses, the defendant is not entitled (by virtue of s. 24 (1)) to dispute the validity of the action taken by the local authority upon any ground which could have been raised on any appeal by him under section 23 (4). This prohibition does not, of course, apply when the person who is sued under section 24 (1) is not the person who had a right of appeal under section 23 (4).

In *Joyner & Wife* v. *Guildford Corporation* (*j*) the local authority served an enforcement notice requiring the removal of garages erected without planning permission. *After the period for the removal of the garages had expired*, the authority declared its intention to enforce the notice by removing the garages itself on or after January 1, 1953. This date was postponed twice, the final date being March 4, 1953. On March 2, two days before the expiry of the final postponement, the authority entered on the plaintiffs' land and demolished the garages, the plaintiffs having taken no steps themselves to do so. The plaintiffs alleged that entry on their land was a trespass and the demolition of the garages unlawful, but it was held that although the planning authority had a complete discretion as to the period for the execution of work required to be done by an enforcement notice and could extend that period if it so wished, a period which had once elapsed could not thereafter be extended. Accordingly, the successive postponements of the date by which the plaintiffs were to remove the garages were, in the circumstances, purely acts of grace on the part of the authority and were not extensions of the specified period as set out in the enforcement notice.

In the case of non-compliance with an enforcement notice requiring the discontinuance of a use of land, or the compliance with conditions, or the carrying out of operations on land, the local planning authority may prosecute any person who, without planning permission uses the land or causes or permits the land to be used, or carries out or causes or permits those operations to be carried out in contravention of the notice, and any person so prosecuted is liable to a fine not exceeding £50. In addition, in the case of the continuance of a prohibited use of land a daily penalty of £20

(*j*) (1954) 5 P. & C.R. 30.

may be imposed for every day on which the use is continued (s. 24 (3)).

Att.-Gen. v. *Bastow* (*k*) shows that in the case of a persistent offender, repeatedly fined for continuing a prohibited use, it is possible for the Attorney-General, at the relation of the local planning authority, to obtain against the offender an injunction perpetually restraining him from using land in a manner prohibited by an enforcement notice.

Finally, there may be mentioned the case of *Cole* v. *Somerset County Council* (*l*) in which the local planning authority served an enforcement notice requiring the discontinuance of the use of land as a caravan site. Automatic planning permission for the development of land for use as a recreational caravan site by members of an organisation holding a certificate under section 269 of the Public Health Act, 1936, is given by Article 3 and Class V (relating to permitted development) of the Town and Country Planning General Development Order, 1950 (*m*). It was in reliance on this automatic permission that the land in question was allowed, by the owner, to be used as a caravan site by members of the Caravan Club of Great Britain and Ireland, a club which held the Public Health Act Certificate above mentioned. By Article 4 of the 1950 Order, however, it is open to the local planning authority, with the Minister's permission, to make a direction removing specified development from the category of permitted development under Article 3 of the Order and in 1953, *more than three years after the land involved in this case had been developed as a caravan site*, the authority made such a direction and the Minister approved it. The direction was served on the owner of the land and an enforcement notice was later served. The question was whether the authority's direction could have retrospective effect and it was held that it could not. Lord Goddard C.J. observed that it seemed to him that Article 4 of the 1950 Order, applied to something to be done in the future. It did not apply to something done in the past under the general permission of Article 3 of the Order. If that general permission had not been acted upon it could have been withdrawn but when a change of use had once lawfully occurred the Minister could not withdraw the permission *ex post facto*. The enforcement notice was clearly invalid.

(*k*) [1957] 2 W.L.R. 340; [1957] 1 All E.R. 497.
(*l*) [1957] 1 Q.B. 23.
(*m*) S.I. 1950, No. 728.

EQUITABLE INTERESTS AND "MERE EQUITIES"

By V. T. H. Delany, m.a., ll.d., Barrister-at-Law

Discussion of the deserted wife and her rights in the matrimonial home goes on apace (*a*); and while the limits of her licence (if this be her status) in the context appear to have been fairly well marked out (*b*), there has been comparatively little consideration or comment on its precise nature. The decision of Upjohn J. in *Westminster Bank Ltd.* v. *Lee* (*c*) has, however, revived interest in an almost forgotten distinction, between an equitable interest properly so-called and a "mere equity," and though this distinction has not been received with universal favour in connection with the deserted wife (*d*), it may be of some interest to make a short investigation of its background and validity.

In *Westminster Bank Ltd.* v. *Lee*, it will be recalled, the contest lay between a deserted wife on the one hand and a subsequent equitable mortgagee, who had no express notice of the desertion, on the other. After a consideration of the authorities, Upjohn J. reached the conclusion, albeit reluctantly, that the wife's occupation did not constitute notice of her interest in the home and, further, that this interest could be overridden by that of the mortgagee, even though the latter's was an equitable interest only, on the ground that the wife's interest was a "mere equity" and so liable to be displaced by the purchaser of even an equitable interest for value without notice. With the desirability of this refinement in the circumstances we are not here concerned; it seems, indeed, that this branch of the law has now reached an *impasse* from which it can only be rescued by the intervention of the legislature. The fact remains that the distinction has been resurrected and that it merits some examination.

It is usually suggested that the first instance of the contrast being made between equitable interests and mere equities is to be found in *Phillips* v. *Phillips* (*e*), where Lord Westbury said that

(*a*) See Crane, "The Deserted Wife's Licence" (1955) 19 *Conveyancer* 343, for a most valuable discussion of the law.

(*b*) *Jess B. Woodcock* v. *Hobbs* [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445; *Westminster Bank Ltd.* v. *Lee*, *infra*.

(*c*) [1955] 3 W.L.R. 376; [1955] 2 All E.R. 883

(*d*) See Gray, "Equitable Priorities and the Matrimonial Home" (1955) 18 M.L.R. 596; R.E.M., "Mere Equities, the Bona Fide Purchaser and the Deserted Wife" (1955) 71 L.Q.R. 480; H. W. R. Wade, "Equitable Interests and 'Mere Equities'" [1955] Camb.L.J. 158.

(*e*) (1864) 4 De G.F. & J. 208. It has been suggested that there is a contrary opinion of Lord Westbury to be found in *Eyre* v. *Burmester* (1862) 10 H.L.C. 90, but that case appears to turn on the better right to call for the legal estate, which was held not to pass by estoppel. *Cf.* Lord Cranworth at 106.

"where there are circumstances that give rise to an equity as distinct from an equitable estate—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake—and the purchaser under the instrument maintains the plea of purchaser for value without notice, the court will not interfere." The Lord Chancellor mentioned at least three circumstances in which the plea of purchaser for value without notice was familiar in the Court of Chancery before the Judicature Acts: (a) in applications to the auxiliary jurisdiction in aid of an action at law; (b) in the case of a purchaser or mortgagee paying his purchase money without notice of some prior equitable interest and subsequently getting in the legal estate; and (c) as a defence against a mere equity. The result of the Judicature Acts was to abolish the effect of the plea under the auxiliary jurisdiction, since relief is now granted in each division of the High Court in respect of legal titles upon the same principles as formerly governed the granting of relief to a legal title under the old jurisdiction in equity (*f*). Moreover, the second instance given by Lord Westbury, the *tabula in naufragio*, is no longer possible since the Law of Property Act, 1925 (*g*).

There are dicta in favour of the existence of a distinction between equities and equitable estates in some of the earlier cases (*h*), and an example of its operation appears to be seen in *Bowen* v. *Evans* (*i*), a decision of Sir Edward Sugden, sitting as Lord Chancellor of Ireland. There, the plaintiff sought to have a deed set aside for fraud. The contract for the sale of lands in question had been made some fifty years before suit was brought, and the conveyance had not been executed until many years afterwards. One of the defendants was claiming under a settlement for value of the lands, which had been executed by the original purchaser under the contract. It was admitted that this defendant's interest was an equitable one, but it was suggested that he could not raise the plea of purchase for value against the plaintiff. Sugden L.C. thought he could. He said: "Although there is considerable difference of opinion on this point, . . . yet . . . I think he [the defendant] might avail himself of his character of purchaser for valuable consideration without notice, as a defence, whether his title be a legal or an equitable one . . . although the

(*f*) *Ind, Coope & Co.* v. *Emmerson* (1887) 12 App.Cas. 300, 306, *per* Lord Selborne.

(*g*) s. 94 (3).

(*h*) *Hamilton* v. *Royse* (1804) 2 Sch. & Lef. 315, 327; *Dunbar* v. *Tredennick* (1813) 2 B. & B. 304, 318, *per* Lord Manners C.: ". . . This is not the case of a distinct and positive trust, but of a doubtful equity, which may or may not be impeachable, it cannot affect a purchaser for full and valuable consideration."

(*i*) (1844) 6 Ir.Eq.R. 569; 1 Jo. & Lat. 178; 2 H.L.C. 257.

next hour the party [with the legal estate] may be able to turn him out of possession" (*k*). This appears to have been based on the reasoning that the plaintiff's right to have the transaction impeached for fraud was a mere equity, and so was liable to be displaced by the defendant's equitable estate, acquired for value and without notice of the plaintiff's claim.

The distinction taken by Sugden L.C. and amplified by Lord Westbury was further explained by Fry J. in the well-known case of *Cave* v. *Cave* (*l*). X, a trustee, had improperly invested trust moneys in the purchase of land, the legal estate was conveyed to the purchaser, Y, who made legal mortgages to Z, and equitable mortgages to R. Fry J. held, on the particular facts of the case, that the mortgagees took without notice; that Z was a purchaser for value without notice taking the legal estate and therefore had priority over all, but as between the *cestuis que trust* and R, the former's money having been invested in the land, they had an equitable estate as distinguished from a mere equity, and they therefore took priority over R, the equitable mortgagee without notice. Fry J. distinguished the case from the third class put by Lord Westbury in *Phillips* v. *Phillips*, but recognised and approved of the doctrine there laid down, that the defence would apply in the case of a mere equity. There, Lord Westbury had suggested that "every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to and no more." In other words, once the vendor has already parted with his equitable interest, he can convey to a purchaser only that which remains in him, and so the earlier conveyance must take priority. This, however, cannot apply in the case of a mere equity, for the vendor still has the whole equitable interest which he can pass to the purchaser. Examples of such equities which do not inhibit the vendor are the right to have a lease rectified for mistake (*m*); the right to have it set aside for fraud (*n*); the right to have a charge set aside for undue influence (*o*); and (possibly) the right to have a voidable appointment under an equitable power set aside (*p*).

Most of the cases, however, have involved the conflict which arises between *cestuis que trust* whose trustees have committed

(*k*) *Cf. Joyce* v. *De Moleyns* (1845) 8 Ir.Eq.R. 215; 2 Jo. & Lat. 374, *per* Sugden L.C.

(*l*) (1880) 15 Ch.D. 239; *Cf. Frith* v. *Cartland* (1865) 2 H. & M. 417.

(*m*) *Garrard* v. *Frankel* (1862) 30 Beav. 445; *Smith* v. *Jones* [1954] 1 W.L.R. 1089; [1954] 2 All E.R. 823.

(*n*) *Ernest* v. *Vivian* (1863) 33 L.J.Ch. 513.

(*o*) *Bainbrigge* v. *Brown* (1881) 18 Ch.D. 188.

(*p*) *Cloutte* v. *Storey* [1911] 1 Ch. 18, 24

breaches of trust, and equitable incumbrancers who have taken without notice of the trust. In this connection it must be remembered that, as was pointed out by Kindersley V.-C. in *Rice* v. *Rice* (*q*) (a conflict between an unpaid vendor and an equitable mortgagee), priority of time gives the better equity only if they are in all other respects equal, and he added that "it is impossible (strictly speaking) that two persons should have equal equities, except in a case in which a Court of Equity would altogether refuse to lend its assistance to either party as against the other." In that case, since the right of the unpaid vendor is quite clearly an equitable interest (*r*), the Vice-Chancellor seemed to think that, in principle, the possession of the title-deeds to the mortgaged property might weigh the scales in favour of the mortgagee. This appears to be borne out by the decision of the Court of Appeal in Ireland in *Re ffrench's Estate* (*s*), where the facts were substantially similar to those in *Cave* v. *Cave*, but on which the court reached a contrary conclusion, holding that the rights of the mortgagees must prevail over those of the *cestuis que trust*. In his judgment Porter M.R., after stating that he was "unable to find any important distinction between the case before us and *Cave* v. *Cave*," went on to say: ". . . In my opinion the equity of the appellants [the mortgagees] here is a superior equity to that of the respondents. The right to follow trust funds is a right to do something—to take steps to alter the existing, open, notorious enjoyment of property. The primary right of the *cestui que trust* is against his own trustees, whom he can compel to restore the funds out of their own estates. The right to trace the fund into its improper investment is ancillary to this, or in substitution for it. As against the trustees, it is as complete an equity as may be; but as against innocent purchasers, permitted to deal with the apparent owner of the property as if no such right existed, I cannot think that it ought to prevail—that is, when the purchaser has done all in his power to complete his title. . . . I regard the right as rather in the nature of a chose in action than an estate—an equity as distinguished from an equitable interest—and therefore inferior to that of [the mortgagee]." The other members of the court, FitzGibbon and Barry L.JJ., agreed, and although laches had been pleaded against the plaintiffs, Porter M.R. was prepared to hold that even in the absence of delay their equity was an inferior one.

(*q*) (1854) 2 Drew. 73.

(*r*) *Mackreth* v. *Symmons* (1808) 15 Ves. 329; *Kettlewell* v. *Watson* (1882) 21 Ch.D. 685; (1884) 26 Ch.D. 501; *Re ffrench's Estate* (1887) 21 L.R.Ir. 283, 308, *per* Porter M.R.

(*s*) (1887) 21 L.R.Ir. 283.

The reasoning in *Re ffrench's Estate* was followed in two other Irish cases. In the first, *Re Sloane's Estate* (*t*), the trustees of a settlement, with the concurrence of the life tenant, spent trust funds in carrying out building works on lands owned by the life tenant and not forming part of the settled property. One of the trustees became aware that a breach of trust had been committed, and sued his co-trustee, obtaining a declaration that the trust fund was a charge on the building works. Prior to the suit, the tenant for life had made an equitable mortgage of the buildings to a bank, and, in a contest as to priority between the bank and the life tenant, Monroe J. held that the former's claim took priority, saying that the right to follow the trust fund into the land was a "lower" equity than that of the mortgagee.

The second case, *Scott* v. *Scott* (*u*), involved a similar claim by next-of-kin of an intestate against an administratrix who had invested assets in a house, later depositing the title deed with a bank by way of mortgage. Holding that the bank must take priority, O'Connor M.R. said: "Any of them could have commenced an action against her and could have made her liable for the full value of the assets which she had illegally dealt with . . . or, at his election, he could have adopted the trading and made her account for all her trade dealings. These were the alternative equities, either of which could have been asserted. The latter alternative has been adopted which, no doubt, means following the assets of the intestate into property which has come to represent them. But this is a mere equity—it is not an equitable estate, which involves a definite lien, charge, or claim on a definite item of property. It is not like a vendor's lien for unpaid purchase money, or an equitable mortgage of specific property, or a claim by a *cestui que trust* arising out of a trust of specific property. It is rather a right of action, the assertion of which may result in the capture of property for a particular trust. It is well settled that in a contest of priorities such a claim cannot prevail against an equitable estate, such as the bank has in the present case—that is, an equitable mortgage on specific items of property."

In the result, there appears to be a clear-cut divergence of opinion between the decisions, the Irish cases giving preference to the equitable incumbrancer and the English cases placing the *cestui que trust* first. In this connection it is interesting to note that the decision of the Court of Appeal in *Re Vernon* (*v*), which is sometimes cited in support of Fry J. in *Cave* v. *Cave*, seems,

(*t*) [1895] 1 I.R. 146; *Cf. Bourke* v. *Lee* [1904] 1 I.R. 280; *Re Bobbett's Estate* [1904] 1 I.R. 461; *Bank of Ireland* v. *Cogry Spinning Co.* [1900] 1 I.R. 219.

(*u*) [1924] 1 I.R. 141.

(*v*) (1886) 32 Ch.D. 165; 33 Ch.D. 402.

in reality, to be at variance with his view. There, X, who held an equity of redemption in trust for Y, sold it to Z, who took without notice. Y was preferred to Z, on priority of time, but in the court below Bacon V.-C. had found that Z had notice of the trust, and the Court of Appeal did not dissent from this.

CONCLUSIONS

Such being the state of the authorities, it is relevant to make the following comments:

1. The distinction between an equitable interest properly so-called and a mere equity is a well established one, of considerable antiquity, and it seems settled that the latter can be defeated not only by the bona fide purchase of the legal estate without notice, but also by the bona fide purchase of the equitable estate without notice (*w*).

2. The doctrine of *Hunt* v. *Luck* (*x*), to the effect that notice of an occupying tenant is notice of his estate and rights under the agreement on which he holds, does not extend to an equity to rectify (*y*); and (probably) does not extend to any "mere equity" (*z*).

3. In some of the cases a distinction has been drawn between the rights of a *cestui que trust* against his trustee, and his right to follow the trust property into the hands of third parties. This distinction probably can be rationally justified on the ground that there is a stronger policy in favour of the protection of the interests of the *cestui que trust* of an express trust than in the case of one who seeks to enforce what is only a constructive trust. The general principle is thus stated in the American *Restatement of Restitution*, § 202: "Where a person wrongfully disposes of property of another, knowing that the disposition is wrongful, and acquires in exchange other property, the other is entitled at his option to enforce either (a) a constructive trust of the property so acquired, or (b) an equitable lien upon it to secure his claim for reimbursement from the wrongdoer." The process of following the trust property into its product involves making the defaulting trustee a constructive trustee of the product, and gives the *cestui que trust* a charge on it. Until some step is taken to

(*w*) *Cf. Williams* v. *Greatrex* [1957] 1 W.L.R. 31 at 36, where Denning L.J. repeats the distinction.

(*x*) [1902] 1 Ch. 428.

(*y*) *Smith* v. *Jones* [1954] 1 W.L.R. 1089; [1954] 2 All E.R. 823.

(*z*) *Westminster Bank Ltd.* v. *Lee* [1955] 3 W.L.R. 376; [1955] 2 All E.R. 883, *per* Upjohn J. The effect of the decision of the Court of Appeal in *Jess B. Woodcock* v. *Hobbs* [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445 on this is doubtful. See Crane, note (*a*), *supra*.

enforce this charge the right of the *cestui que trust* is a mere equity, in common with his other rights, namely his equitable lien, his right to be subrogated to the claim of a third person, and his personal claim against the defaulting trustee (*a*). This appears to be inherent in the view of O'Connor M.R. in *Scott* v. *Scott*, and is probably at the root of the distinction between equitable interests and mere equities which was taken by Lord Westbury in *Phillips* v. *Phillips*.

4. It has been stated (*b*) that "a mere equity is a right to a remedy for fraud or mistake only. The essence of the distinction is between a concrete right of enjoyment enforceable against the estate owner and a mere right to upset the transaction"; but, it is suggested, the field of mere equities is wider than that, and extends to all personal claims which *may* be converted into equitable estates or interests. Perhaps the true explanation (*c*) lies in the fact that the mere equity is *discretionary* in character: the deserted wife must go to court in order to establish her status in the matrimonial home, and the granting or withholding of her licence is in the discretion of the court; similarly, the *cestui que trust* who seeks a "tracing order," the vendor who wishes to set aside a deed, must go to court to assert their rights, and in exercising its discretion the court will be slow to act in a way that will operate against an innocent purchaser for value, even of the equitable estate.

As long ago as 1887, John Barr Ames put the matter in this way, which seems to summarise it correctly (*d*): "Just as the honest purchaser of a legal title from one who holds it subject to an equity acquires that legal title discharged of the equity, so also the purchaser of an equitable title from one who holds it subject to an equity takes the equitable title discharged of the equity. In all other cases, the rule of priority governs, unless modified by the principle of estoppel."

(*a*) The distinction has been attacked in the United States as being a "mere artificial refinement": Scott on *Trusts* (1939), Vol. III, 1593, but the cases cited in support are not convincing. See notes (*e*) and (*v*), *supra*, where it is suggested that both *Eyre* v. *Burmester* and *Re Vernon* can be explained on other grounds.

(*b*) Gray, in (1955) 18 M.L.R. 596.

(*c*) This suggestion is advanced by H. W. R. Wade in [1955] Camb.L.J. 158 and may be compared with the dictum of Porter M.R. in *Bourke* v. *Lee* [1904] 1 I.R. 280 at 283: "The position of the *cestuis que trustent* was that they might or might not follow the trust property; but that could not be done without a decree of the court."

(*d*) Ames, "Purchase for Value Without Notice" (1887) 1 Harv.L.R. 1. The cases cited by Professor Ames in support of this statement would appear to bear it out fully: *Sturge* v. *Starr*, 2 M. & K. 195; *Lane* v. *Jackson* 20 Beav. 535; and *Penny* v. *Watts*, 2 De G. & S. 501. In all of them the *cestui que trust* was postponed to the innocent purchaser of the equitable interest.

THE JUDICIAL CONTROL OF DISCRETIONARY POWERS OF PUBLIC AUTHORITIES

By J. F. Garner, ll.m., Solicitor

Local and other public authorities have such wide powers under modern statutes (especially in relation to privately owned land) that it may be of interest to consider how far, if at all, they may be controlled by the courts in matters where they have a discretion vested in them by statute. We here propose first to consider the matter generally, and then to endeavour to apply the general principles to a matter of topical interest, namely rent rebate and rationalisation schemes for local authority houses under the Housing Acts.

A General Principles

The basis of judicial control over the statutory powers of local or other public authorities is, it is submitted, the *ultra vires* doctrine; if the authority are shown to be acting outside the bounds of their statutory powers, they will be held, in any court in which the point may be raised, to be acting illegally, with all the consequences that such a finding may imply (*a*). Apart from the obvious case of excess of powers, the following general principles have been established by decisions of the courts:

(1) If a statutory power may be exercised in more than one way, means must be chosen that will not unnecessarily interfere with private rights. Thus, if a hospital board are authorised by statute to erect an infectious diseases hospital, and there are many sites on which such a hospital may be erected, the board may have to pay damages to a person aggrieved if the site ultimately chosen results in a nuisance being caused (*b*). On the other hand, if the statute had authorised the hospital to be erected on a specific parcel of land, or if it is clear that that parcel and no other must be chosen if a hospital is to be erected at all, then probably no

(*a*) This may mean that the action taken by the public authority is quashed, as in the making of an *ultra vires* compulsory purchase order; proceedings may fail as in a prosecution for a breach of a by-law found to be *ultra vires*; the authority may be held liable in trespass or some other tort as where, *e.g.*, the authority purpose to exercise a power of entry in circumstances where they are subsequently held to have had no such power; or an injunction may lie against the authority if a plaintiff can establish that he is aggrieved by the *ultra vires* act of the authority.

(*b*) *Metropolitan Asylums Board* v. *Hill* (1881) 6 App.Cas. 193; *Rapier* v. *London Tramways* [1893] 2 Ch. 588.

action for damages would lie (*c*). It should also be noted that this principle merely affords a *solatium* for the person aggrieved; it does not necessarily follow that in these circumstances the court would automatically grant an injunction so as to prevent the power from being used in such a manner as might or would cause a nuisance (*d*). If it is clearly inevitable that the power must, when exercised, lead to the commission of a nuisance, the public authority concerned must be prepared to establish that every reasonable precaution has been taken, if they are to escape liability in the courts (*e*).

(2) In a case of a judicial or quasi-judicial discretion vested by statute in an administrative authority, the following principles will apply:

(a) The courts will grant an order in the nature of mandamus where an applicant (for a licence or other administrative act that might result from an exercise of the authority's decision) is aggrieved in consequence of a total failure or refusal to exercise the discretion (*f*); this principle may be invoked in cases where, by reason of bias or some improper motive, the authority can be said not to have exercised their discretion. Similarly, the discretionary powers of a public authority cannot be divested by an agreement made by the authority (*g*).

(b) Any quasi-judicial discretion must be exercised in accordance with the principles of "natural justice," as recognised by the common law; *i.e.*, "both sides," or, more often, the applicant seeking the intervention of the courts, must be given a fair hearing (*h*) and also the administrative authority seised with the duty of making a decision may not act as judge in their own cause. So far as the latter point is concerned, the statute may, in some cases, instruct the authority so to act (*i*), and, in the case of a local authority,

(*c*) Compensation may be payable in such circumstances if the enabling statute so provides (as in s. 278 of the Public Health Act, 1936).

(*d*) In the U.S.A., federal or state legislation of this kind would probably be held invalid unless it could be brought within the "police power," as being contrary to the "due process" clause.

(*e*) See, *e.g.*, *London, Brighton, etc., Ry.* v. *Truman* (1885) 11 App.Cas. 45 and such cases as *Geddis* v. *Proprietors of the Bann Reservoir* (1878) 3 App.Cas. 430.

(*f*) *Glossop* v. *Heston & Isleworth L.B.* (1879) 12 Ch.D. 102; *R.* v. *Weymouth Corporation, ex p. Teletax, Ltd.* [1947] K.B. 583.

(*g*) An agreement cannot override an authority's own by-laws; *Buchanan* v. *Redcliffe Town Council* [1950] Q.S.R. 24 (Aus.), and an authority cannot contract not to make a by-law which it is within their statutory powers to make; *Wm. Cory & Son* v. *London Corporation* [1951] 2 K.B. 476.

(*h*) See, *e.g.*, *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B.(N.S.) 180.

(*i*) Especially where the admnistrative authority is a Minister of the Crown; see, *e.g.*, *Franklin* v. *Minister of Town and Country Planning* [1948] A.C. 87.

the principle may mean little more than a requirement of compliance with the provisions regulating the disclosure of pecuniary interest by members of the council (*j*).

(c) If the statute lays down a particular procedure to be followed in the course of exercising a particular discretionary power, this procedure must be observed strictly, under penalty of invalidation, by the court of the purported exercise of the power. A limit to the court's jurisdiction under this heading is set in some statutes, where it is provided that recourse may be had to the courts only if the plaintiff, a "party aggrieved" (*k*), has been "substantially prejudiced"; alternatively, the statute may impose a time limit, shorter than the normal limitation period (*l*), within which proceedings to question the validity of the exercise of the power must be brought (*m*).

(3) It has been suggested (*n*) that a further principle can be deduced from the decided cases, namely, that the courts may be invoked (*o*) where the administrative authority have exercised their discretion with improper or corrupt motives. The cases put forward in support of this suggested recognition by the courts of *mala fides* as vitiating the exercise of a statutory power do not, it is submitted, support the argument, and can be interpreted as being but specialised illustrations of applications of the *ultra vires* doctrine. *Smith* v. *East Elloe R.D.C.* (*p*) is authority for the proposition that an allegation of bad faith is not sufficient to set aside a time limit set by the statute within which a complaint against an administrative act may be lodged with the courts (*q*); several remarks made by their Lordships in this case can be used

(*j*) Local Government Act, 1933, s. 76.

(*k*) See *Burke* v. *Minister of Housing and Local Government* (1957) 8 P. & C.R. 25; [1956] J.P.L. 429.

(*l*) As in para. 15 of Sched. I of the Acquisition of Land (Authorisation Procedure) Act, 1946; *cf.* the "no substantial miscarriage of justice" proviso in s. 4 (1) of the Criminal Appeal Act, 1907.

(*m*) See *Smith* v. *East Elloe R. D. C.* [1956] A.C. 736; 6 P. & C.R. 102.

(*n*) By Mr. S. A. de Smith, in "The Abuse of Statutory Powers," in [1956] *Public Law*, at p. 233, and see Mr. West's article, "The Exercise of Statutory Powers by Local Authorities," at (1954) 18 Conv.(N.S.) 504.

(*o*) Albeit only on proceedings for a declaration; often the circumstances are such that an order in the nature of mandamus or certiorari will not lie.

(*p*) [1956] A.C. 736; 6 P. & C.R. 102.

(*q*) In this case the period of limitation stated in the statute was six weeks; Acquisition of Land (Authorisation Procedure) Act, 1946. Mr. De Smith, in the article cited, is of the opinion that "it is obviously unsatisfactory that the six weeks' period for challenging an order should have to be rigidly enforced in every case"; but is this so? Six weeks may not be long enough (although the Minister's confirmation of a compulsory purchase order is not the first an aggrieved person hears about an order in any ordinary case!), but even so, surely the local authority are entitled to have some date fixed after which they can rely on their title to the land acquired under the authority of the compulsory purchase order?

to argue also that there can be no challenge to the *bona fides* of the exercise of a power in a particular instance, where the power has been granted by the statute in general terms. We are not here greatly concerned with the precise statutory interpretation of the power in this particular case; suffice it to note that none of their Lordships looked elsewhere than to the terms of the statute itself for any principle of the invalidating effect of bad faith.

It has been suggested by Mr. De Smith (*r*) that the courts will interfere with the misapplication of powers by local authorities; but the cases he cites in support of this view can also be explained, it is submitted, by the *ultra vires* doctrine. Thus, the railway companies in the last century were prevented from acquiring land for purposes other than those for which the power of acquisition had been conferred by Parliament (*s*), and in *Sydney Municipal Council* v. *Campbell* (*t*) that council had purported to use a statutory power to acquire land compulsorily expressly given for the purpose of effecting improvements in the city, so as to acquire land not for improvements, but to ensure that the enhanced value that would accrue to the land as a consequence of the improvements being carried out on adjoining land would be enjoyed by the council, on behalf of the city. It was agreed that the council had acted *bona fide* in the interests of their residents but, as their action was not within the terms of the enabling statute, it was declared *ultra vires* and void (*u*).

In the same article, it is also suggested that *R.* v. *Paddington & St. Marylebone Rent Tribunal, ex p. Bell, etc., Properties, Ltd.* (*a*), in which a local authority referred to the rent tribunal under the Furnished Houses (Rent Control) Act, 1946, the contracts of letting for some 2,000 flats *en bloc*, gives an indication that the courts will examine the purpose for which an administrative authority have exercised a statutory power entrusted to them, and (presumably) quash the decision if the court does not approve of the purposes motivating the particular decision. It is true that in this case an order of certiorari was granted, but the court so ordered not because they did not approve of the local authority's reasons for their decision, or because there was any allegation of *mala fides*, but simply because it was clear that in the circumstances the local authority had not fully considered the matter. As Lord Goddard C.J. said (*b*),

(*r*) *Ibid.*

(*s*) *e.g.*, *Webb* v. *Manchester and Leeds Ry.* (1839) 4 Myl. & Cr. 116 and the Canadian case of *Nihan* v. *St. Catherines & Niagara Central Ry.* (1888) 16 O.R. 459.

(*t*) [1925] A.C. 338.

(*u*) And *cf.* such cases as *Gard* v. *Commissioners of Sewers* (1885) 28 Ch.D. 486 and *Lamb* v. *Town of Estevan* [1922] 3 W.W.R. 1187 (Can.).

(*a*) [1949] 1 K.B. 666. (*b*) *Ibid.*, at p. 681.

> "the action of the borough council in referring the whole of these flats in the manner they have done is not a genuine exercise of the powers conferred on them by the Act";

in other words, it was a quasi-judicial decision in which the procedural rule *audi alteram partem* had not been observed.

In some statutes, the purposes for which the power may be exercised are stated in the enactment itself. This was so in *Earl Fitzwilliam's Wentworth Estates Co.* v. *Minister of Town and Country Planning* (*c*), in which the Central Land Board were authorised by section 43 of the Town and Country Planning Act, 1947 (*d*), to acquire land "for any purpose connected with the performance of their functions under the following provisions of this Act." In view of the specific terms of the enabling statute, it is not surprising that no one argued in this case that the applicants were not entitled to challenge a compulsory purchase order made under the section on the grounds that it had been made for an improper purpose. The case is not, however, any authority for suggesting that the courts may inquire into the purposes behind the making of such an order, in a case where no restricting words appear in the enabling statute (*e*). Similar observations apply to the Canadian case of *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada* (*f*), where the Privy Council declared void, on the grounds of *ultra vires*, an Act of the Albertan legislature taxing banks in the Province, as part of that legislature's programme of Social Credit, as such legislation was held not to have been passed for "the raising of a revenue for Provincial purposes," under section 92 (2) of the British North America Act, 1867.

In *Roberts* v. *Hopwood* (*g*), the Poplar Borough Council, being empowered by statute to pay such wages "as they may think fit," paid higher wages than the general level in the district, as they did not consider that the wages generally paid in the district amounted to reasonable living wages. The district auditor disallowed these payments and surcharged them on the members of the council; on appeal, the House of Lords agreed with the district

(*c*) [1952] A.C. 362.

(*d*) Before it was amended by the Act of 1953.

(*e*) It may be suggested that some of the remarks of their Lordships in the House of Lords in *Demetriades* v. *Glasgow Corporation* [1951] 1 All E.R. 457, afford an example of the contrary view; *e.g.*, *per* Lord Reid, at p. 463, "I am far from saying that in no case can the actions of the local authority be challenged by legal action. Admittedly, the authority must act in good faith . . . ," and there was no suggestion of "good faith" or "bad faith" being relevant in the terms of the enabling statute. Nevertheless, these remarks were *obiter*, made in a Scots case, and all their Lordships treated the question at issue as turning on the exact terminology of the Defence Regulations, under which the power called into question had been exercised.

(*f*) [1939] A.C. 117.

(*g*) [1925] A.C. 578.

auditor that such payments were illegal, saying that the council stood "somewhat in the position of trustees or managers of the property of others." In *Associated Provincial Picture Houses* v. *Wednesbury Corporation* (*h*), it was said by Lord Greene M.R. that the *ratio decidendi* of *Roberts* v. *Hopwood* was that the House of Lords found that, in fixing wages as they did, the council had done so "by reference to a matter which they ought not to have taken into account and to the exclusion of those elements which they ought to have taken into consideration in fixing a sum which could fairly be called a wage." It is submitted, therefore, that *Roberts* v. *Hopwood* is not really an authority for the proposition that the courts will intervene to prevent an abuse of power, but establishes that, when local authorities have a statutory discretion over the manner in which they may expend rate fund moneys, they are bound strictly by the terms of the enabling statute, and also that they must act in the best interests of the ratepayers as a whole (*i*)—to that extent the courts will "gloss" the statute but no further (*j*).

Where an absolute discretion is given by statute to a local authority in a purely administrative matter, and there is no question of *vires*, the courts will not normally interfere with the manner in which that discretion is exercised. Thus, in *Shelley* v. *L.C.C.* (*k*), it was held that the court could not inquire into the reasons for which a local housing authority might require possession of a house provided by them under the Housing Acts, provided they alleged that possession was required in the course of "housing management," a function expressly vested in the authority by statute (*l*). Where a local authority were empowered to grant licences for the Sunday opening of cinemas, "subject to such conditions as the authority may think fit to impose," the court would not inquire whether the authority had acted "reasonably" in imposing particular conditions in a specific case (*m*).

However, some of the remarks made in the decisions dealing

(*h*) [1948] 1 K.B. 223.

(*i*) And even this principle will not be taken too far, as the courts will only require the authority to be "reasonable," bearing the interests of the ratepayers in mind: see, *e.g.*, *Re a Decision of Walker* [1944] K.B. 644.

(*j*) This is, it is suggested, but a modern illustration of a general principle established many years ago, in such cases as *Att.-Gen.* v. *Aspinall* (1837) 2 Myl. & Cr. 613, to the effect that a local authority are virtually in the position of trustees of public funds, with their ratepayers as the beneficiaries; *Prescott* v. *Birmingham Corporation* [1955] Ch. is a very recent further illustration of this general principle. The principle is also recognised in Canada: *McMillan* v. *Winnipeg* [1919] 1 W.W.R. 591.

(*k*) [1949] A.C. 56.

(*l*) Housing Act, 1936, s. 83.

(*m*) *Associated Provincial Picture Houses* v. *Wednesbury Corporation* [1948] 1 K.B. 223.

with the dismissal of school teachers on other than educational grounds may suggest that the courts do at times assume a jurisdiction to inquire into the motives that inspired a local or other public authority to take a particular decision. In *Short* v. *Poole Corporation* (*n*), the local education authority had dismissed the plaintiff school teacher because she was a married woman. It was argued that the authority were actuated by motives, and had pursued aims, wholly outside their province as local education authority, although by section 148 (1) of the Education Act, 1921, they were given powers to appoint teachers, and to remove them, without disqualification. The Court of Appeal refused to grant a declaration to the effect that the local authority had acted illegally or *ultra vires*, Pollock M.R. saying in the course of his judgment (*o*),

> "Where a discretion is given to the local authority, it is for that authority to exercise it, provided that its action is not *ultra vires*, nor its powers exercised corruptly or *mala fide*. Where the exercise of the discretion is challenged, it is for the plaintiff to prove that there is a duty in the courts to interfere upon the grounds already stated. . . . The authority may appear to be right or may appear to be wrong in the course they have adopted, according as that course may be subjected to criticism from one point of view or another. Upon such discussion and criticism it is not for the courts to pronounce. So long as the discretion has been exercised and the limits of discretion are not passed, the decision rests with the local authority."

In *Sadler* v. *Sheffield Corporation* (*p*) the remarks of Esher M.R., in *R.* v. *St. Pancras Vestry* (*q*), were applied:

> "if people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion";

but in *Sadler's* case, the authority had dismissed the plaintiff from their employment as a teacher on financial grounds, whilst purporting to act under section 29 (2) of the Education Act, 1921, which empowered them so to act on educational grounds. Although when taken out of their context some of these remarks may be read as suggesting that the courts will intervene on the grounds of *mala fides*, it is submitted that on the facts they can really be read only as applications of the *ultra vires* principle.

(*n*) [1926] Ch. 66.
(*o*) *Ibid.*, p. 88.
(*p*) [1924] 1 Ch. 483.
(*q*) (1890) 24 Q.B.D. 375; this is really an example of case (b), p. 193, *ante*.

To sum up on this point, there has been no reported case, it is submitted, in which the courts have assumed and exercised jurisdiction to quash a decision of a public authority purely on the grounds of *mala fides* and where the authority were clearly acting within the terms of their statutory powers.

B Local Authority Rent Schemes

It is interesting, as an application of the principles above discussed, to consider how far the courts have shown themselves prepared to control the rents fixed by local authorities for houses provided by them under Part V of the Housing Act, 1936. Under section 83 (1) of that Act, it is provided that,

> "the general management, regulation and control of houses provided by a local authority under this Part of this Act shall be vested in and exercised by the authority, and the authority may make such reasonable charges for the tenancy or occupation of the houses as they may determine."

Further, in section 85 (5), as amended by the Housing Act, 1949, the authority are empowered to grant to any tenant "such rebates from rent, subject to such terms and conditions, as they may think fit," and by section 85 (6) the authority are required

> "from time to time [to] review rents and make such changes, either of rents generally or of particular rents, and rebates (if any) as circumstances may require."

It has been suggested that these provisions give an absolute discretion to the local authority in the matter of the rents they may charge to their tenants; certainly no provision is made in the statute for an appeal to lie from the decision of a local authority fixing a rent either to a ministerial tribunal or to a court of law, but the authority are bound by the terms of the statute and the doctrine of *ultra vires*. The local authority may charge only *reasonable* rents and if the rents they charge can be proved to be unreasonable they may lose any legal proceedings they take to recover those rents, or fail in any proceedings brought against them by one or more of their tenants for a declaration (*r*) in the Chancery Division of the High Court. Since the passing of the 1936 Act, there have been three reported cases of actions for a declaration —all of them were unsuccessful, but indications were given by all the learned judges who decided them that, had the rents been

(*r*) Actions for a declaration seem to have become popular in recent years, as a means of challenging decisions of administrative authorities. Technically the authority would not be obliged to recognise an adverse declaration by the court, but no public authority would ignore one in practice.

different, the respective plaintiffs might have succeeded; in other words, the courts do not decline jurisdiction in such cases.

In *Belcher* v. *Reading Corporation* (*s*), it was said that the question, whether a decision of the authority to raise rents generally can be impeached, depends not on whether it might be preferable to charge this or that item in the authority's accounts against the ratepayers as a whole or to apportion it in some manner as between them and the tenants, but on whether the increased rents are "reasonable," as is required by section 83 (1) of the 1936 Act. In *Smith* v. *Cardiff Corporation* (*t*), the landlord local authority introduced a differential rent scheme for their houses, under which scheme a tenant who earned more than £500 p.a. paid up to 12s. 6d. per week more in rent than other tenants were paying for similar houses owned by the corporation. Danckwerts J. pointed out that the test was whether the rents were reasonable in fact, and not just reasonable in the opinion of the local authority (*u*). Moreover, "a power to discriminate by granting rebates of rent [see s. 85 (5) of the 1936 Act, *supra*] does not necessarily exclude the right to create a similar result by grading-up the rents charged for particular houses in varying amounts." Nonetheless, although the rents charged were held not to be unreasonable and the burden of showing they were not reasonable falls on the person asserting their unreasonableness—the learned judge observed that (*a*)

> "it is right and proper that the local authority's management of their housing estates should be capable of being challenged in a court of law."

In *Summerfield* v. *Hampstead Borough Council* (*b*) the decision of the local authority brought before the court was one whereby the rents of all their houses were "rationalised" or "pooled," so that all the rents of each particular type of house throughout the council's extensive housing estates were fixed at comparable levels, regardless of the actual cost of constructing each particular house, and making rebates from such rents to particular tenants in needy circumstances. Again it was emphasised in the course of the decision (by Harman J.) that the test was whether the

(*s*) [1950] Ch. 380.
(*t*) [1955] Ch. 159.
(*u*) Compare *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66, and *Thomas Fattorini* v. *I. R. Commissioners* [1942] A.C. 643. In the latter case it was said, *per* Lord Atkin (at p. 625), "What is reasonable has consistently been held to depend upon the actual conditions known at the time for decision . . . There is no abstract conception of reasonableness and the conclusion is not to be reached in *a priori* reasoning."
(*a*) [1955] Ch. at p. 176.
(*b*) [1957] 1 W.L.R. 167.

rents charged were reasonable, and the learned judge could see no rule of law placing any duty on the local authority to limit the rent they could charge for any particular house by reference to its prime cost. The action for a declaration was therefore dismissed, the closing remarks in Harman J.'s judgment being,

> "for the tenant who can afford it a rent is not unreasonable if it be no higher than his neighbour will pay who has to rely on the open market."

These cases show, it is submitted, that the courts will exercise jurisdiction to supervise the rents charged by local authorities under Part V of the Housing Act, 1936, but that they are enabled to do so only by the terms of the statute, which restricts the discretion of the local authority to charge a reasonable rent. In practice it may at present be difficult to prove that a particular rent or rents is unreasonable, but this may not always be true. Local authority housing rents will have to bear some relation to costs, as a matter of finance for some time to come, especially in view of the abolition of government subsidies, and, with the free market in private house rents which will eventually come with the total abolition of rent control, political pressure to reduce and abolish rate fund subsidies (*c*) to housing revenue accounts will no doubt get stronger. There may, therefore, well come a time when the rents for council houses are higher than the rents for comparable privately owned houses: it may not then be so difficult, as it was in the three cases above discussed, for an aggrieved litigant to argue that the rent charged is not "reasonable."

C Conclusion

By way of final remarks, it may be pointed out that the legislature in this country has not often decreed that the decision of a public authority on a matter within its discretionary powers shall be final and conclusive, specifically excluding any appeal to the courts of law. The jurisdiction of the courts to issue orders in the nature of the former prerogative writs will not readily be assumed to have been excluded (*d*), but Parliament has provided that there shall be no appeal to the courts, once the opportunities provided by the statute have been exhausted, in the case of

(*c*) The effect of the Housing Subsidies Act, 1936, has been to abolish government subsidies for houses built after a certain date for "general needs," and by s. 8 of the Act the local authority are relieved from the duty imposed on them under the Housing Act, 1936, and earlier legislation, to make any rate fund subsidies. An authority *may* make a contribution to the housing revenue account out of the general rate fund, but they are not obliged to do so.

(*d*) See, *e.g.*, *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171 and such cases as *R.* v. *Hendon R. D. C., ex p. Chorley* [1933] 2 K.B. 696.

demolition and closing orders under Part II of the Housing Act, 1936 (*e*), compulsory purchase orders under the Acquisition of Land (Authorisation Procedure) Act, 1946 (*f*), and orders made under the slum clearance provisions of Part III of the Housing Act, 1936 (*g*).

There is no clear authority in this country, it is submitted, for the proposition that the courts can, apart from a construction of the terms of the enabling statute, concern themselves with the motives or purposes behind an administrative decision. The French doctrine of "détournement de pouvoir" is not only alien to the common law—it is unknown.

(*e*) Housing Act, 1936, s. 15.

(*f*) 1936 Act, 1st Schedule, para. 16. This provision means what is says: *Smith* v. *East Elloe R. D. C.* (*supra*), and English courts will not take the lenient view of such a provision taken by the Canadian courts with regard to a similar provision in provincial labour legislation: see an article by Bora Laskin in the *Canadian Bar Review* for December, 1952, at p. 986.

(*g*) Clearance orders and compulsory purchase orders; see Housing Act, 1936. Sched. II, para. 3.

DETERMINABLE INTERESTS AND THE RULE AGAINST PERPETUITIES

By Philip H. Pettit, m.a., Barrister-at-Law

The present article was stimulated by the recent decision of *Re Cooper's Conveyance Trusts* (*a*). It will be convenient to begin by stating the facts of that case. These are adequately summarised in the headnote which states that by a conveyance dated April 13, 1864, certain land and property were conveyed to trustees " their heirs and assigns for ever " in trust for the purposes of an orphan girls' home and, upon failure of that trust, the land and property in question were to be held in trust for the persons then entitled to certain real estate therein specified, and the aforementioned " messuage . . . hereditaments and premises " were to be conveyed accordingly " and upon or for no other trust or purpose whatsoever." The home was forced to close in 1954 owing to lack of support. The first question which Upjohn J. decided was that the gift over upon failure of the first trust was void as infringing the rule against perpetuities: this is obviously right and the contrary proposition could hardly be seriously argued. The second question considered by the court was, in effect, whether or not the property should be applied for charitable purposes in accordance with the *cy-près* doctrine. Again, Upjohn J. was clearly right in saying that the answer to this depended upon the true construction of the conveyance and it is difficult to dispute his view (*b*) that

> " the donor intended a gift to charity only for a limited time and for a limited purpose; that is to say, the time limited by the time for which the orphanage could be carried on."

As we have seen the gift over on the determination of the interest given to the charity was void, and, in the result, the court held that (*c*)

> " there is an interest in the donor remaining undisposed of; that is held upon trust for her estate by way of resulting trust."

The first question concerns the nature of the interest taken by the charity. There seems to be little doubt, on the construction given to the conveyance by Upjohn J., that the charity was granted

(*a*) [1956] 1 W.L.R. 1096.
(*b*) At p. 1104.
(*c*) *Ibid.*

a determinable interest. It is clear that, even in 1864, when the conveyance was executed, the charity did not take a legal determinable fee, for the legal estate was held in fee simple by trustees. It is submitted, however, that the beneficial limitations had the effect of giving the charity an equitable determinable fee. As has been stated, the remainder was void as infringing the rule against perpetuities which means, of course, that it was void *ab initio*. The next question, therefore, might well be as to the nature of the effective interest following the equitable determinable fee. Again, it is clear that if the beneficial limitations of the 1864 conveyance had not been created behind a trust, the donor would have retained a possibility of reverter. It is submitted that, by reason of the intervention of the trust, the true view of the matter is that the donor retained an equitable possibility of reverter, though it is not sought to say that it is necessarily wrong to describe this interest as a resulting trust.

It is interesting to compare this decision with *Hopper* v. *Corporation of Liverpool* (*d*). In that case the reversion on a lease which has long since expired was conveyed in 1805 by the Liverpool Corporation to the Lyceum trustees

> "during such time and so long as the said building called the Lyceum or any other building to be from time to time erected on the site thereof shall be used and enjoyed for the uses and purposes of the said institution called the Lyceum agreeably to the original articles for its establishment."

There was no limitation of a remainder, but the existence of a void remainder, as in *Re Cooper's Conveyance*, would presumably not have affected the position. In his judgment the Vice-Chancellor of the Chancery Court of Lancaster considered four questions. First, he held that the doubt which had arisen whether a determinable fee was capable of being created since the Statute Quia Emptores was unfounded. It may be noted that, since the Crown was not a party to the proceedings, he did not express any opinion on the question whether the reversion on a determinable fee might not be in the grantor but in the Crown as feudal overlord. He expressly assumed, for the purposes of his judgment, that the reversion belonged to the grantor and the order made was drafted so as not to prejudice any claim by the Crown. For present purposes this point may be disregarded and the order may be treated as a declaration that the Lyceum trustees had an estate in fee simple absolute. Secondly, he held that the legal possibility of reverter was void as infringing the rule against perpetuities.

(*d*) (1944) 88 Sol.J. 213.

Thirdly, he held that the event in which the fee simple determined was not void for repugnancy. And fourthly, he held that " the condition subsequent which is to determine the estate of the Lyceum trustees is void for uncertainty." It is not proposed here to deal with all these points, but to treat only of certain aspects of the second and fourth questions: the discussion will be restricted to a consideration of those matters relevant to a comparison with *Re Cooper's Conveyance.*

The first difficulty of *Hopper's* case is to ascertain what is the *ratio decidendi* or whether, indeed, there are intended to be two alternative *rationes* given. It seems clear that in answering the first three of the above questions the Vice-Chancellor treated the interest granted by the 1805 conveyance as a determinable fee, and the case has, so far as I am aware, always been referred to on this basis. The answer to the fourth question, however, gives rise to a certain amount of doubt. The question posed was " whether the event which determines the fee simple estate of the Lyceum is void for uncertainty." After discussing the construction of the relevant clause on the issue of uncertainty, for the first time and without any introduction or explanation the Vice-Chancellor stated that " the event which causes the determination must be construed as a condition subsequent," and he continued for the remainder of his judgment to consider the issue of uncertainty in language which is at least as apt for a fee simple upon condition subsequent as a determinable fee. If the proper construction of the 1805 conveyance was that it created a fee simple upon condition (a construction which, it is submitted, cannot be supported) then I would respectfully agree that *Sifton* v. *Sifton* (*e*) applied and that the trustees of the Lyceum took an estate in fee simple absolute free from the condition. If this is the true *ratio decidendi* it is accordingly submitted that the judgment is wrong on the question of construction, but right on the law, as to which it is, however, merely following well-established rules; and further, that the answers to the first three questions were *obiter.* On this view the decision is not in any sense a binding authority on determinable fees. It is, of course, recognised that a judge may give alternative reasons for his decision, in which case one is not entitled to pick out one ground as being the true *ratio,* stigmatizing another as being merely *obiter.* But in the instant case, if one ground of the decision rests on the basis that the 1805 conveyance created an interest subject to a condition subsequent, then it could be argued that any remarks

(*e*) [1938] A.C. 656. The Privy Council in this case had no doubt that the interest created was subject to a condition subsequent and not a determinable interest.

on the question of determinable fees must be *obiter*, since, as will be submitted, for reasons which will subsequently appear, the form of the declaration made is incompatible with the interest created being a determinable fee.

Notwithstanding what has been said, it is the writer's opinion that in answering the fourth question the Vice-Chancellor was not intending to make the fundamental change of view referred to, and was not seeking to do more than say that the determining event in the case of a determinable fee must be ascertainable with the same degree of certainty as the condition in the case of a limitation upon condition subsequent. This last proposition would seem to be unexceptionable, and, despite some confusion of language, it is submitted that this is the proper construction of the judgment. Such a construction means that the word, "as," in the phrase "the event which causes the determination must be construed as a condition subsequent," must be construed as meaning "in the same way as," and that it must be limited to the point in discussion, *i.e.*, the issue of uncertainty. When the phrase is read in the context of the whole judgment, it is submitted that this is in fact the only satisfactory construction, and it will be assumed for the remainder of this article that it is the correct one.

On this assumption the Vice-Chancellor held on the one hand that the determining event was void for uncertainty and on the other hand, that the possibility of reverter was void as infringing the rule against perpetuities: further, as already stated, he held that the result was to give the Lyceum trustees a fee simple absolute. It is difficult to see how, if the interest granted was a determinable fee, this result can be right. In the first place, if the determining event is void for uncertainty the result would seem to be that the determinable interest purported to be granted is void altogether, for to construe it as a fee simple absolute would be to alter the quantum of the estate given to the grantee. This was made clear in *Sifton* v. *Sifton* (*f*) which was actually cited by the Vice-Chancellor on the uncertainty point, on which point, as regards a condition subsequent and, by inference, also as regards a determinable interest, it is, of course, a leading authority. It was argued in that case that a determinable interest was created, but having expressed a clear view that the interest was subject to a condition subsequent the Privy Council observed (*g*):

> "In substance, no doubt, there is not much difference between a trust to pay until the happening of a certain event, and a trust to pay that is abrogated on the happening of that

(*f*) [1938] A.C. 656: see also *Re Moore* (1888) 39 Ch.D. 116.
(*g*) [1938] A.C. at p. 677.

> event. But the legal effect in the two cases of the event being described with insufficient certainty are widely different. In the first case the trust will fail altogether. In the second case the trust will remain, and it will be the clause of abrogation that will fail."

In the second place, if the determinable fee is valid but the possibility of reverter is void, it is likewise difficult to understand how the Lyceum trustees could become entitled to an estate in fee simple absolute. The essence of a determinable fee is its *automatic* determination, without the need of any re-entry when a particular event happens or a particular state of affairs comes to an end, and, accordingly, the failure of some subsequent interest can hardly have the effect of giving to the grantee an interest greater than that which he was expressly granted. If the possibility of reverter is to be held void, the property seems to be left in the air and the only solution that can be suggested is that the Crown could claim it as *bona vacantia*, a proposition that has never, I think, been put forward in the courts.

It is now proposed to turn to consider the second point made by the Vice-Chancellor in *Hopper's* case namely that the rule against perpetuities applies to a possibility of reverter. It is not proposed to enter into a general discussion of this problem. There is a great deal to be said on either side (*h*) but it is intended to restrict the matter here to two points involving an apparent inconsistency of authorities.

First, it is submitted that *Hopper's* case cannot be validly distinguished from *Att.-Gen.* v. *Pyle* (*i*), a decision of Lord Chancellor Hardwicke, which was not cited to the court. There a testator had devised a freehold messuage to a charity school and directed that the rents and profits should be applied for the benefit of the school, so long as it should continue to be endowed with charity. The judgment on this point reads,

> "Where a sum of money is given to a charity, so long as it shall continue to be endowed with charity, it is only given *quousque*, and when it ceases, if it is a gift of real estate, it shall fall into the inheritance for the benefit of the heir, if personal, into the residuum."

It was accordingly ordered that the messuage should be conveyed to the trustees of the charity for what, presumably, can only have been a determinable fee. The only distinctions between the two

(*h*) See the criticisms in *Conveyancer's Year Book*, 1945, p. 203; 62 L.Q.R. 222: note, however, the approval of the decision by Morris & Leach in *The Rule Against Perpetuities*, pp. 205–206.

(*i*) (1738) 1 Atk. 435.

cases which can be suggested are that in *Att.-Gen.* v. *Pyle* the limitations arose under a will (though this was to be carried into effect by a conveyance by the heir-at-law) whereas in *Hopper's* case the determinable fee was created directly by *inter vivos* conveyance; and that in *Att.-Gen.* v. *Pyle* the determinable fee was limited to a charity, while in *Hopper's* case, though the point was not mentioned, presumably the purposes of the trust were not in fact charitable. Neither of these distinctions would seem to be capable of affecting what should happen when the determinable fee came to an end: the charity distinction, which might at first sight have some appeal as there is, to some extent, a relaxation of the rule against perpetuities in favour of charity, breaks down when it is realised that the non-charity (as has been assumed) in *Hopper's* case is in a favourable position compared with the charity in *Att.-Gen.* v. *Pyle*.

Secondly, there is the difficulty of reconciling *Hopper's* case with *Re Chardon* (*j*) which was recently followed by Wynn-Parry J. in *Re Chambers Will Trusts* (*k*). If *Hopper's* case and *Re Chardon* are both to be regarded as rightly decided, it is difficult to see any other ground of distinction than that one case concerns realty and the other personalty, *i.e.*, one concerns a determinable fee and the other an analogous interest in personal estate. Particularly since the property legislation of 1925, which had as one of its main objects the assimilation of the rules relating to real and personal property, this seems to be an unsatisfactory ground of distinction. In any event it is not a distinction which is available to reconcile *Hopper's* case with *Re Cooper's Conveyance*. The only distinction (apart from the charity distinction referred to in discussing *Att.-Gen.* v. *Pyle* and *Hopper's* case, which is clearly inadequate here for the same reasons) between these latter two cases which can be suggested is that the former case was concerned with a legal determinable fee while the latter was concerned with the corresponding equitable interest which was, nevertheless, an interest in realty; this seems a finer and even more unsatisfactory ground of distinction than the one which was available in respect of *Re Chardon*, particularly as, since 1925, it has been impossible for a determinable fee to exist as a legal estate. It must be admitted that it was apparently never suggested in *Re Cooper's Conveyance Trusts* that what has been termed the equitable possibility of reverter might be void as infringing the rule against perpetuities. It is the writer's submission that had

(*j*) [1928] Ch. 464.

(*k*) [1950] Ch. 267. See also *Re Randell* (1888) 38 Ch.D. 213: *Re Blunt's Trusts* [1904] 2 Ch. 767.

such an argument been put forward it should have been rejected and that the conflicts above referred to should be disposed of, if and when the problem comes before a higher authority, by overruling *Hopper's* case upon this point. Another way to remedy the unsatisfactory position would, presumably, be to say that the principle expressly or impliedly accepted in *Att.-Gen.* v. *Pyle*, *Re Cooper's Conveyance* and the *Re Chardon* line of cases is wrong. It is submitted, however, that it is now far too late to argue that a resulting trust analagous to a possibility of reverter is void as infringing the rule against perpetuities. Apart from other considerations it is an implicit assumption in cases such as *Att.-Gen.* v. *Malland* (*l*) and *Re Hartshill Endowment* (*m*) where a determinable interest which may last for ever, has been held to be valid, that there is a valid resulting trust for the testator's estate; and it is likewise the basis of many of the *cy-près* cases, that, unless a general charitable intention can be shown, there will be a resulting trust for the donor or the testator or their respective estates, on the failure of a trust, or in the event of a surplus, as the case may be, no matter that the trust may not fail or the surplus not arise until a date outside the perpetuity period.

Unless the law with regard to determinable interests is to perpetuate the fine and illogical distinctions referred to, it is accordingly submitted that possibilities of reverter and resulting trusts should remain unaffected by the rule against perpetuities. As already mentioned, it is not desired on this occasion to adumbrate the more general arguments, but it is, I think, uncontroversial to say that such a rule would not be inconsistent with the history of those interests: that there is no compelling reason why the rule against perpetuities should apply equally to interests upon condition subsequent and determinable fees (and there are grounds for supporting a distinction): and that there is no authority apart from *Hopper's* case, contrary to such a rule, while there is authority (including a decision not cited in *Hopper's* case) in its favour. In conclusion it is submitted that, for the reasons stated, such authority as *Hopper's* case has upon this matter must be restricted to legal determinable fees created before 1926, *i.e.*, it does not affect, *inter alia*, any determinable interest created after 1925.

(*l*) (1832) You. 562.
(*m*) (1861) 30 Beav. 130.

SHARES ABSOLUTE THOUGH SETTLED

By E. O. Walford, ll.d., Solicitor

Probably all conveyancers are aware of the existence of the doctrine or rule in *Lassence* v. *Tierney* (*a*), often referred to in modern decisions as the rule in *Hancock* v. *Watson* (*b*) in which latter case the rule was stated in a rather wider form. However, those who have not encountered its application in practice may tend to regard it as a rule which does not require consideration when preparing a will or settlement by which the residuary estate or a specific trust fund is being settled on children and their issue. It is precisely because certain common form clauses may bring into operation the rule in *Lassence* v. *Tierney*, with perhaps unexpected results, or which may add yet another case to the numerous decisions in which it has been necessary to resort to the court to determine whether the rule is or is not applicable that this article came to be written.

The Rule

The rule in *Lassence* v. *Tierney* (referred to below as "the Rule") is that where there is an original gift to A, whether trustees are interposed or not, and that gift is apparently absolute, but trusts are engrafted upon it under which others may take certain interests in the subject of the gift, those interests are construed as merely eating into the absolute gift without destroying it. Consequently, in so far as the engrafted trusts fail to exhaust the whole of the subject-matter of the gift, the original absolute gift remains effective. There may be nothing surprising in that proposition; but it may be desirable to mention that the Rule is in no respect in conflict with the doctrine of repugnancy. The trusts may operate *pro tanto* in defeasance of the "absolute" interests, but there would appear to be no objection to such defeasance provided that any other interests created by those trusts must vest within the period permitted by the rule against perpetuities, notwithstanding that the result *is* to destroy the original "absolute" interest. This is so even if it is an *equitable* interest in fee simple, if the decision in *Re Leach* (*c*) is sound law. And it will be recalled that the

(*a*) (1849) 1 Mac. & G. 551. (*b*) [1902] A.C. 14.
(*c*) [1912] 2 Ch. 422. That decision has not escaped criticism. The word "absolute" has been placed within quotation marks because the notion of an absolute interest completely defeasible is somewhat contradictory: see, in that connection, the observations in *Fyfe* v. *Irwin*, in a later part of this article.

possibility of a fee simple with a disposition over upon the failure of issue "or in any other event," is recognised by section 20 of the Settled Land Act, 1925, the owner of such a fee simple having the powers of a tenant for life.

What would perhaps be surprising to a testator who has settled shares on, say, his children in terms which expressly state that those shares shall *not* vest absolutely in them but shall be retained upon trust to pay the income of those shares to the children with an ultimate gift in favour of their issue, is that such shares will, on failure of such issue, pass absolutely to the children of the testator or to their personal representatives as part of their estates, with the result that those shares may either go to the surviving spouse of a son or daughter of the testator, or to some charity or stranger under the will of the childless son or daughter. It is not suggested that the Rule will necessarily fail to give effect to the intention of the testator. The point is that he should be made aware of the effect of the Rule and should be asked what disposition he proposes to make if *all* his children or other relatives on whom shares are settled should die without leaving issue who take a vested interest.

Appropriation of Shares

If the will or settlement is not so drawn as to dispose of the property in all eventualities it may be necessary to apply to the court to determine whether the Rule is applicable. This point is emphasised because there are certain decisions which it is practically impossible to reconcile. Thus, in *Re Cohen's Will Trusts* (*d*), there was a gift by will of the residuary estate

"to be equally divided amongst my children hereinafter named *subject to the provisions and directions hereinafter contained.*"

The shares in question were to be retained by the trustees and were settled on the children and their issue. One daughter died childless and, as to half of the capital of her share, there was no provision as to its destination. According to later decisions to be mentioned below, the paramount intention that the residue should be "equally divided amongst his children" would create a strong prima facie case for applying the Rule. Similarly the reference in the engrafted trusts to the tenancy for life of the original donee has not been considered sufficient to prevent the Rule from applying. Nevertheless, in the instant case, basing his judgment on the words italicised above, and the reference to the interests of the children under the engrafted trusts as life interests (which according to other decisions is irrelevant) the learned judge held

(*d*) [1936] 1 All E.R. 103.

that the Rule did not apply and that the half share passed to the next-of-kin of the testator.

Another case and one which was not followed (*e*), though not actually dissented from, is *Re Payne* (*f*) where five equal parts of a fund were to be appropriated to each of the testator's five sons. The shares were not to vest in the sons, but were to be held by the trustees and ultimately to go to the children of the sons. It was held that there was no absolute gift and that when the engrafted trusts failed as to one of the shares the share passed as on an intestacy of the testator. In *Re Marshall* (*g*) the initial provision was to divide a fund into seven parts and to "pay and transfer" two-sevenths to a son followed by a settlement on trusts which failed. It was held that the Rule applied and that the capital of the two-sevenths shares passed to the personal representatives of the son who had died. In *Re Gattis' Voluntary Settlement Trusts* (*h*), where *Re Payne* (*i*) was referred to, there was a direction to divide a fund into shares and to appropriate one of such shares to each of the settlor's children. The shares were not to vest absolutely in the children but to be held upon trust as to the income for the children, and then for their children. The fact that the settlor's children were called "life tenants" did not prevent Farwell J. from holding that the Rule applied there being also references to the shares of the children in the engrafted trusts; see also *Re Burton's Settlement Trusts* (*j*).

Void Gifts Over

Fyfe v. *Irwin* (*k*) is another case in which the rule was applied. A daughter whose share of residue was settled, dying without issue, it was held that her share fell into her estate notwithstanding a provision that in default of issue of any daughter her share was to pass to the other residuary legatees. That proviso was construed as referring to the other legatees *who survived her*, none of whom did in fact survive her. The facts were somewhat complex; but in the course of his opinion, Lord Russell of Killowen made certain observations concerning the Rule which may be of assistance in considering whether it applies. They were to the following effect:—

(1) A gift over after an apparently absolute gift (*l*) "whether in favour of issue or of strangers seems alike, whether as

(*e*) See *Re Gattis' Voluntary Settlement Trusts* [1936] 2 All E.R. 1489, mentioned later in this article.
(*f*) [1927] 2 Ch. 1.
(*g*) [1928] Ch. 661.
(*h*) [1936] 2 All E.R. 1489.
(*i*) [1927] 2 Ch. 1.
(*j*) [1955] Ch. 348.
(*k*) [1939] 2 All E.R. 271.
(*l*) *Ibid.*, at p. 277.

regards its effect upon, or its inconsistency with, or its relation otherwise to, the original absolute gift. To the extent to which it [the gift over] takes effect, it hinders the operation of that absolute gift, and there seems no reason why, when the hindrance disappears, the original gift should not operate as much in the one case as in the other." He therefore rejected the contention that the fact that there was an ineffective gift over, failing issue of the daughter, prevented the Rule from applying.

(2) "It is, in my opinion, impossible on principle or authority to hold that, assuming an initial gift of fee to a legatee, the existence of a destination over not in favour of the legatee's issue will exclude the application of the doctrine of initial [*i.e.*, absolute] gift on the failure of the engrafted trusts" (*m*). That statement may seem to imply more than was intended. If, when the whole of the provisions are read, it is quite clear that an apparently absolute initial gift is cut down to a life interest by the operation of subsequent trusts or provisions which *take effect* and ultimately vest the subject-matter in some person or persons in fee simple or for an absolute interest, then there is no room for the application of the Rule. If, however, as in *Hancock* v. *Watson* (*n*), there is an apparently absolute gift to a legatee, with a gift over to her children, and another gift over on failure of such children, but the legatee has no children and the gift over also fails because it infringes the rule against perpetuities, the original gift to the legatee takes effect under the Rule.

Lord Russell's observation may also have been directed to the fact that if there is a *clear* intention that the beneficiary shall have the fee simple and the powers of an owner in fee simple and the trusts or provisions which follow are incompatible with the original gift in fee simple, then the original gift takes effect and the ultimate trusts or provisions are void.

If trusts are engrafted on an original gift, or if there are gifts over which fail, followed by a gift of residue, or if the failure of the engrafted trusts would otherwise produce an intestacy or a resulting trust in favour of the settlor, the original absolute gift will take effect, and thus defeat the claim of the residuary legatee, the next-of-kin or the settlor, as the case may be: *cf. Hancock* v. *Watson* (*o*). However, a residuary gift could be so framed, as expressly to comprise a gift over on failure of children of the

(*m*) *Ibid.*, at p. 278.
(*n*) [1902] A.C. 14.
(*o*) [1902] A.C. 14.

original devisee or legatee, and if that gift over were otherwise valid it would take effect and prevent the application of the Rule, subject to the remarks of Lord Russell in *Fyfe* v. *Irwin* as set out above.

Accruer

It frequently happens, where there is a gift to members of a class of persons, that provision is made for the accruer to the other members of any share in respect of which the trusts engrafted upon an initial absolute gift shall fail. The utmost care is necessary in framing such provisions, and despite the use of standard clauses many cases have arisen in which it has been necessary to resort to the courts in order to discover the effect of those provisions. Nor have the judges themselves always been in agreement when the problem has come before them: see *Fyfe* v. *Irwin* (*p*).

The facts in *Re Litts Will Trusts* (*q*) were too complex to be stated in a few lines, but it furnishes an example of a case in which the accruer clause itself embodied a provision which brought into play the Rule, when the last of the children died. In the accruer clause dealing with failure of vesting of a share, such share was to go to the other children and the children of deceased children, such last mentioned children to take the share of their deceased parent. The court considered that if the reference had been to the share, *the income of which* the parents would have taken, then the Rule would not have applied, "because *ex hypothesi* the parent never would have taken any share in the capital." The result was that the estate of the last surviving child took absolutely the accrued shares as well as her own share notwithstanding the fact that she had left no children. This case shows how a probably quite unintended result can follow from the application of the Rule, the testator presumably never having considered the possibility that all his children might die without leaving issue. Whether he would have given the whole of the shares to the estate of the last survivor in such a case is merely a matter of conjecture. No doubt the amount of the settled fund might have been one of the material factors for consideration.

In *Re Walter's Will Trusts* (*r*) the Rule was discussed, but not applied. The testator's will contained an accruer clause, which provided for the accruer of lapsed shares to the *shares* of the daughters and not to the daughters. The accruer was to be to the shares of daughters who had not been married (with the requisite consent) at the time of the death of the daughter whose

(*p*) *Ante*, p. 207.
(*q*) [1946] Ch. 154.
(*r*) [1949] Ch. 91.

share had lapsed. The testator had eight daughters, six of whom predeceased him without having married, and two other married daughters, L. and G., who died after the testator without leaving children. It was held that the shares of L. and G. accrued to the shares of the *deceased* unmarried daughters, upon the trusts applicable to such shares. The ultimate result was that the three sons of the testator took the *corpus* equally, because in the case of a daughter dying a spinster the will provided that her share was to go to the sons in equal shares. For our present purpose the main interest in that decision lies in the fact that by the will, absolute interests had first been given to the daughters and then trusts had been engrafted upon those interests. It was, therefore, argued that the Rule applied. The court, however, came to the conclusion that the engrafted trusts did in fact exhaust the entire beneficial interests under the will.

The decision, therefore, illustrates the above statement to the effect that the Rule does not apply if the testator has in fact provided for the destination of the fund in all the events which have in fact occurred. It is impossible, however, to study the numerous decisions concerning the application of the Rule without realising that even an astute conveyancer may fail to provide for all the events which can possibly happen, or ensure that the accruer clause will necessarily exclude the Rule. Nor, quite apart from the Rule, do common form accruer clauses fail to produce their own problems: see, for example, *Re Huntington's Settlement Trusts* (*s*) and *Re Atkinson's Will Trust* (*t*).

The Settlor's Intention

Although, once it is held that there is an initial absolute gift with trusts engrafted and gifts over which fail, the absolute gift takes effect, whatever doubt the court may entertain as to the intentions of the settlor. It is necessary, as the court has pointed out in numerous cases, to examine the whole of the provisions of the will in order to decide whether the initial gift is absolute. In *Re Hatch* (*u*) Roxburgh J., referring to certain trusts engrafted upon a share appropriated by will to the testator's son, observed that even an instructed reader would say that the first engrafted trust was a life interest subject to a provision for defeasance, but that he was inclined to think that that was not the position in law.

(*s*) [1949] Ch. 414.
(*t*) [1957] 1 Ch. 117.
(*u*) [1948] Ch. 592, at p. 597.

"It seems to me," he observed, "that the reasoning in *Att.-Gen.* v. *Lloyds Bank, Ltd.* (*a*) would compel me to hold that the entire beneficial interest bestowed on the first defendant by the rule in *Hancock* v. *Watson* (*b*) could not be cut down by any lesser disposition in favour of the first defendant himself, and that, accordingly, during the period during which he received the income of his share—before the happening of the events to which I will refer later—he received it not by virtue of the express life interests, subject to defeasance, which the will purported to confer on him, but by virtue of the entire beneficial ownership which he acquired under the rule in *Hancock* v. *Watson*, and which up to that time had not been cut down by any effective engrafted trust.

"But although that is my view of the legal position, it is plainly not the view which the testator had in mind. He plainly thought that the effect of the engrafted trust was to confer on his son a life interest subject to defeasance with divers remainders over, and I am satisfied that I ought to construe the defeasance clause on that footing."

In that passage the learned judge appears to be saying that as a matter of law the position is as first stated by him, according to the terms of the will, but having come to the conclusion that the testator would have taken a different view of the legal effect of the words used, he would construe the clause accordingly. If that were the meaning of the judge, it would of course, be impossible to know whether any given will would be construed according to the Rule or whether the court would construe the will according to its conjecture as to the probable intention of the testator. That was not the meaning of the judge. In a later part of his judgment, his Lordship made it clear that after the death of the son in question, subject to any appointment (as provided by the will) and in default of issue, there would be no further effective engrafted trust and the son's beneficial interest would no longer be defeasible. In other words the Rule would apply and his share would form part of his estate. It is, therefore, clear that his Lordship's remarks were confined to the immediate effect of the engrafted trust for life, the reference to a possible "defeasance with divers remainders over" being limited to the effect of the engrafted trusts, and in no way denying the absolute character of the initial gift, or the application of the Rule to that absolute initial gift.

It may be convenient to state here that whilst the court must

(*a*) [1935] A.C. 382.
(*b*) [1902] A.C. 14.

inevitably apply the Rule if satisfied that the initial gift is absolute, there is no doubt whatever that although the initial gift may be so worded as to attract the rule under appropriate circumstances, the court must be satisfied upon a consideration of the whole of the trusts and provisions affecting the gift, or qualifying its enjoyment, that there is an initial absolute gift. Thus, if the testator after giving to X a fund or share of a fund then settles it upon trusts which provide with certainty for the ultimate vesting in some other person of an absolute interest in both capital and income, the necessary conclusion is that the initial gift was not intended to be absolute, so that there is no room for the application of the Rule. The very sweeping observations of Lord Russell of Killowen, set out in the earlier part of this article, must be interpreted in the light of the overriding principle that the Rule is one of construction intended (though not always with success) to give effect to that which the testator would have provided in the will if he had foreseen the events which have in fact occurred. It must, however, be confessed that modern decisions tend rather to favour the application of the Rule in cases of doubt, rather than to presume a resulting trust or intestacy. Having regard to the peculiar results which sometimes flow from the application of the Rule, it may be thought by some that it would have been better to assume that it did not apply to cases where there is a statement that the gift is not to vest absolutely in the beneficiary but is to be retained upon certain trusts, which do not exhaust all possible events. When the position is complicated by an accruer clause in technical form, it can be seen from the very recent case of *Re Atkinson's Will Trusts* (*c*) what may ensue. There the residuary estate of A. was given by his will upon trust for C. and E. in equal shares, but with the usual declaration that their respective shares should not vest absolutely in C. and E. but should be retained on trust for them for life and then for their issue. Neither C. nor E. had any issue, and E. died in 1927 and C. in 1955. Now, but for the accruer clause in the will which provided that on failure of the above-mentioned trusts as to either share it should go over to the other share upon the trusts declared concerning that other share, when E. died in 1927, childless, her estate would have benefited under the Rule because the initial gift was absolute and her share would have become part of her estate. Under the accruer clause it might be supposed that E.'s share would pass to C. So it would have done if the accruer clause had merely provided that the share was to go over to the other share. In fact it continued (admittedly in accordance with the common form

(*c*) [1957] 1 Ch. 117.

clause) by applying the trusts of C.'s share to the accruing share. Consequently, as the engrafted trusts of that original share had come to an end when C. died, Upjohn J. decided that the original absolute gift in favour of E. remained effective. Whilst it may be thought that there was poetic justice in that result, it will be seen that, in so far as the testator could grasp the meaning of the technical accruer clause at all, he would have assumed that if E. should die first without issue, C. would take her deceased sister's share in addition to C.'s own original share. The thought that, because the gift of C.'s share had trusts engrafted upon it which failed, the accruer clause would not operate, could hardly be attributed to a layman.

The Moral

The moral to be derived by practitioners from the many cases which have in the past troubled and continue to trouble the courts by reason of the doubt whether the Rule applies and, if so, with what result, should be that they will not so draw any will or settlement as to leave any doubt as to the ultimate vesting of an absolute interest in some person or persons whether by way of express resulting trust in favour of the settlor, or even in favour of the next-of-kin of some specified person.

In the case of a settlement of shares in property or of the proceeds of sale thereof, the Rule can be avoided by the omission from the gift to the trustees of any direction to appropriate the respective shares in favour of the beneficiaries, and by referring to the shares of which the beneficiaries are entitled to the income and not to "the shares of the beneficiaries." A simple form of settlement designed to avoid any possibility of the application of the Rule will be found at p. 693.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

Hughes v. *Waite and Others* [1957] 1 W.L.R. 713; [1957] 1 All E.R. 603 (Ch.D.)

Mortgage—claim to possession—purported tenancies created before mortgage—whether binding on mortgagee.—In August and September, 1955, two persons called Waite (not before the court) obtained from the three defendants, C., M. and D., substantial sums as " deposits " or " advance rents," in respect of proposed tenancies of three flats. In fact the plaintiff was then the registered proprietor of the property, which she transferred to the Waites on October 26, 1955, they, on the same day executing a registered charge in her favour for part of the purchase money. These two dispositions were registered on November 14, 1955, when legal estates passed (Land Registration Act, 1925, s. 20). C. was let into possession on October 31, 1955, M. on November 5, 1955, and D. on November 21, 1955. The Waites never paid anything on the mortgage but disappeared and the plaintiff now sought possession.

Harman J. held (1) the arrangements between the Waites and the other three defendants were so nebulous as not to amount to any purported tenancies. Consequently, C., M. and D. were merely " occupiers on sufferance of the flats which they now occupy " ([1957] 1 W.L.R. at p. 719; [1957] 1 All E.R. at p. 607); (2) even if there were tenancies or agreements binding the Waites, no estoppel affected the plaintiff; and (3) the payments constituted a fine (referring to *City Building Society* v. *Miller* [1952] Ch. 840) so that there could have been no valid exercise of a mortgagor's power of leasing under the Law of Property Act, 1925, s. 99.

It is well settled that the taking of possession followed by the payment of rent creates a periodical tenancy. It can now be added that payment of a lump sum followed by possession may result merely in a licence. On this point the learned judge seems to have applied the principles laid down in the various recent lease-or-licence cases—*cf. Errington* v. *Errington* [1952] 1 K.B. 290, especially the judgment of Denning L.J. The other points in the decision, however, give rise to some difficulty. The doctrine of feeding the estoppel says that if A, having no legal title, purports to grant a tenancy to B, and A later acquires a legal title, then B's tenancy, up to that moment good against A by estoppel, becomes a valid legal tenancy good against the world. In *Church of England Building Society* v. *Piskor* [1954] Ch. 553, noted *ante*, Vol. 18 at p. 313, the Court of Appeal held that as a matter of law a conveyance to a purchaser must inevitably precede a mortgage by him, even though the transactions are completed simultaneously. Therefore it is submitted, with respect, that, if the defendants had tenancies by estoppel against the Waites, those

tenancies were on completion converted into legal tenancies and so the plaintiff must have taken a mortgage of property already subject to leases. Again, with respect, the question of non-binding estoppel or of a mortgagor's leasing powers would not appear to arise.

On the other hand, the Land Registration Act, 1925, does seem to be relevant. As none of the "tenancies" had been protected on the register they would bind the plaintiff only if they constituted overriding interests (L.R.A., 1925, s. 20). The relevant date seems to be that of registration of the disposition (*City Building Society* v. *Miller* [1952] Ch. at pp. 845, 851). At this date, the defendants C. and M. were in possession and could have claimed an overriding interest under section 70 (1) (g) of the Act; D. was not in possession and so could have claimed only under section 70 (1) (k) (terms for three years or less created at a rent without a fine). Here the decision that the advance payments were a fine would have defeated him. It is, therefore, submitted that as regards the defendants C. and M., the decision is best supported on the ground that they had no tenancies which could be fed by estoppel.

Four-Maids, Ltd. v. *Dudley Marshall (Properties), Ltd.*
[1957] 2 W.L.R. 931; [1957] 2 All E.R. 35 (Ch.D.)

Mortgage—claim to possession—court's power to adjourn—mortgagee's legal right—R.S.C., Ord. 55, r. 5A and Practice Direction, 1936.—Under R.S.C., Ord. 55, r. 5A, mortgagees frequently ask for an order for possession without any other form of relief, as a preliminary to the exercise of their power of sale out of court. The Practice Direction, 1936, requiring the application for possession to show the state of account between the parties, adds "When possession is sought and the defendant is in arrear with any instalments due under the mortgage or charge, and the Master is of opinion that the defendant ought to be given an opportunity to pay off the arrears, the Master may adjourn the summons on such terms as he thinks fit . . ." (*Annual Practice*, 1957, at p. 123). This power to adjourn has to be reconciled with the undoubted right of any legal mortgagee to go into possession as soon as the mortgage has been executed, by virtue of his legal term of years or statutory power under a charge by way of legal mortgage (Law of Property Act, 1925, s. 87) subject only to the liability to account strictly on the basis of wilful default or neglect (see Halsbury's *Laws of England*, 2nd ed., Vol. XXIII, pp. 386 *et seq.*).

In *Hinckley and South Leicestershire Permanent Benefit Building Society* v. *Freeman* [1941] Ch. 32, Farwell J., emphasising both the mortgagee's legal right to possession (at pp. 37–38), and the court's power to adjourn (at p. 39), upheld a master's order adjourning the summons for three months provided weekly repayments were kept up. In *Robertson* v. *Cilia* [1956] 1 W.L.R. 1502; [1956] 3 All E.R. 651 (noted *ante*, p. 68) all arrears of instalments had been paid when the summons was heard, but nevertheless the mortgagee's demand for possession on default of repayment of the whole loan (which had been properly demanded) was upheld, Upjohn J. refusing to regard the

Practice Direction as giving a general power of indefinite adjournment. In the present case (where neither of the above two cases was cited in the judgment) the mortgage, dated February 17, 1956, made no provision for repayment by instalments but included an agreement that the principal would not be called in before December 31, 1958, if interest was paid within seven days and other obligations observed. The interest due on August 17, 1956, was not paid till September 27, and in the meantime, on August 29, the mortgagee gave notice calling in the principal. No part of this was paid and so a summons for possession was issued on January 4, 1957. Harman J. upheld the master's order for possession in two months, with some doubt whether the usual period of twenty-eight days should have been exceeded. The learned judge strongly emphasised the mortgagee's legal right to possession and expressed the view that the Practice Direction applied only to mortgages repayable by instalments.

The conclusion seems to be that a mortgagor who is liable to repay by instalments may obtain a limited adjournment to see if he can make his peace with the mortgagee. If the latter stands on his rights he will get possession—and sooner rather than later. Accountability on the basis of wilful default or neglect is still the principal safeguard against arbitrary action by mortgagees. Whether this is sufficient in the financial conditions of the present time may be debateable (*cf. ante*, p. 68).

Re Freeman-Thomas Indenture [1957] 1 W.L.R. 560; [1957] 1 All E.R. 532

Restrictive covenant—application for declaration that land no longer affected—Law of Property Act, 1925, *s.* 84 (2).—This was an application under the Law of Property Act, 1925, s. 84 (2), by the Corporation of Eastbourne, for a declaration that freehold land was no longer affected by certain restrictive covenants and that no person was entitled to enforce the same. In 1901, the corporation as purchasers had covenanted with " F.F.T. and other the owner or owners for the time being of the Ratton Estate in the said County of Sussex, his and their heirs and assigns," to keep the relevant land as a public park, but now desired to build on part thereof. The Ratton Estate had been split up and no longer existed as an entity. Harman J. held, first, that the covenant had been made with the owners of the Ratton Estate as a whole (who no longer existed) and not with the owners of any part thereof. On this point the decision is similar to *Re Ballard's Conveyance* [1937] Ch. 473 where it was held that a covenant with the owners of the " Childwickbury Estate " was not broken unless the act complained of adversely affected the whole estate; contrast *Zetland* v. *Driver* [1939] Ch. 1 where the covenant was expressed to be for the benefit of the whole, or any part or parts of the unsold land. The greater efficacy of the second form of wording has again been emphasised.

Having regard to the above finding, and to the fact that none of thirty-nine persons made respondents had entered an appearance, Harman J. made the desired declaration. In so doing, he held that

all persons with a probable interest had been made parties, following *Re Sunnyfield* [1932] 1 Ch. 79 and also stressed the discretionary nature of the remedy, saying, " the objections . . . are in fact objections more of a moral or ethical nature which this court will only look at because this is a discretionary jurisdiction " ([1957] 1 W.L.R. at p. 563; [1957] 1 All E.R. at p. 535). This sentence is of considerable interest, for in Newsom on *The Discharge and Modification of Restrictive Covenants* (1957) the learned author suggests that an applicant may well find it advantageous to proceed under section 84 (2) because only questions of law are there involved, whereas in an application under section 84 (1) the Lands Tribunal will go into the merits. The extent of the judicial discretion under section 84 (2) is a matter of importance, for the absence of a declaration *in rem* to clear the title may often, in fact, stop a proposed development, even if a successful later objection is most improbable. Up to the present, it seems to have been thought that under section 84 (2) success on the question of law was conclusive.

Monmouthshire County Council v. *British Transport Commission* [1957] 1 W.L.R. 456; [1957] 1 All E.R. 662 (Q.B.D.)

Highway—duty of repair—approaches—Railways Clauses Consolidation Act, 1845, *s.* 46.—Under the Railways Clauses Consolidation Act, 1845, s. 46, the defendants were responsible for repairing a road bridge and its " immediate approaches." When the bridge was originally built by a railway company in pursuance of statutory powers, a stretch of road, some 500 yards in all, on either side of the bridge, had been built on an embankment, which was now slipping. Lord Goddard C.J. held that the word " approaches " was limited to an area immediately adjacent to the bridge, supporting his decision by reference to section 50 of the Act (requiring fencing of " immediate approaches ") and dicta in *London & North Western Ry.* v. *Skerton* (1864) 5 B. & S. 559 where " approaches " was said to be equivalent to, or *ejusdem generis* with, the words " ascent and descent " also applied to the bridge by section 46.

Chivers & Sons, Ltd. v. *Cambridge County Council*
Trustees of the National Institute of Agricultural Botany v. *Cambridge County Council* [1957] 2 W.L.R. 646; [1957] 1 All E.R. 882 (C.A.)

Public right of way—draft map—case stated by Quarter Sessions—inferences of fact in the Court of Appeal—National Parks and Access to the Countryside Act, 1949, *s.* 31 (1) (*a*)—*Supreme Court of Judicature* (*Consolidation*) *Act*, 1925, *s.* 25.—In these two appeals the appellants challenged the draft map of public rights of way prepared by the respondent under the National Parks and Access to the Countryside Act, 1949. Quarter Sessions had refused to make a declaration under section 31 (1) (a) of that Act, having found

evidence of an intention to dedicate, and the appellants had unsuccessfully appealed to the Divisional Court by way of case stated. It was now argued that the Supreme Court of Judicature Act, 1925, s. 25, gave the court power to review the findings of fact by quarter sessions and, if necessary, to draw different inferences. The Court of Appeal (Lord Evershed M.R., Morris and Ormerod L.JJ.) dismissing the appeal, held that the only point before them was whether the " unchallenged and unchallengeable findings of ' primary ' fact can be said at some point to have involved some misdirection, some error, of law " (*per* Lord Evershed M.R. delivering the reserved judgment of the court—[1957] 2 W.L.R. at p. 652; [1957] 2 All E.R. at p. 887). No such error was involved in the finding of intention to dedicate. The result of the decision seems to be that on this point of dedication, it will rarely be possible to upset the decision of quarter sessions.

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2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Re Waite's Settlement Trusts
[1957] 1 All E.R. 629 (Ch.D.)

Power of appointment—general power—exercise by residuary gift —restriction on testamentary power by law of domicile—conflict of laws—Wills Act, 1837, *s.* 27.—In the conflict of laws the *lex situs* governs succession to immovables, and the *lex domicilii* the succession to movables. (Dicey, *Conflict of Laws,* 6th ed., at pp. 535, 817.) Restrictions placed by the latter law on testamentary disposition do not affect the exercise by will of a special power of appointment. (*Pouey* v. *Hodern* [1900] 1 Ch. 492.) The position regarding general powers is less certain. Most textbooks say, following *Re Pryce* [1911] 2 Ch. 286, C.A. (reviewing the earlier decisions), that restrictions imposed by the *lex domicilii* apply, *e.g.,* Dicey, *op. cit.,* at pp. 855, 856; Cheshire, *Private International Law,* 4th ed., at p. 836; Graveson, *The Conflict of Laws,* 3rd ed., at p. 287; Theobald on *Wills,* 11th ed., at p. 14; Jarman on *Wills,* 8th ed., at p. 801, and Farwell on *Powers,* 3rd ed., at p. 154 seem to agree, though less certainly. On the other hand, Key and Elphinstone, *Conveyancing Precedents,* 15th ed., Vol. 2, at p. 600, doubt *Re Pryce,* suggesting that the reasoning was disapproved in the estate duty decision of the House of Lords in *O'Grady* v. *Wilmot* [1916] 2 A.C. 231.

Danckwerts J. has now held, (1) that the gift in the will of a testatrix domiciled in Guernsey, of " the rest residue and remainder of the portion of my personal estate whereof I have the disposal according to law," exercised a general power of appointment by virtue of the Wills Act, 1837, s. 27, and (2) that the law of Guernsey, which restricts testamentary disposition to one half of personal estate, did not affect the property subject to the general power. The learned judge relied on Halsbury, *Laws of England,* 3rd ed., Vol. VII, at

p. 62 and on Cheshire, *op. cit.*, at pp. 538, 539. He did not, however, consider a qualifying footnote in Halsbury, and with respect, the passage in Cheshire relied upon deals only with construction, whereas that learned author's opinion on essential validity at p. 536 is as stated above. Danckwerts J. distinguished *Re Pryce* as inconsistent with *O'Grady* v. *Wilmot*, preferring *Re Megret* [1901] 1 Ch. 547, which was itself doubted in *Re Pryce*; he also refused to follow *Re Lewal's Settlement Trusts* [1918] 2 Ch. 391.

One may, therefore, hope that the Court of Appeal will soon review this tangled skein. From the English conveyancer's point of view there is, it is submitted, much merit in the present decision. If it stands, no distinction will have to be drawn on this point when drafting instruments exercising powers of appointment, between movable and immovable property, nor between special, general and "hybrid" powers; nor between exercise by deed and by will; nor will the difficult task of examining the English law of domicile or the testamentary law of a foreign country have to be undertaken. Convenience and certainty are always relevant to the law of conveyancing.

As a postscript, it may be remarked that the power here only escaped the taint of perpetuity because it was general and so, in Lord St. Leonards' words, "equivalent to the fee." A power in favour of issue created by a marriage settlement of 1874, was, in 1924, exercised in favour of a daughter M. E. B. for life and thereafter as she should by deed or will generally appoint; M. E. B. was the present testatrix. (See Morris and Leach, *The Rule against Perpetuities*, at pp. 131–132.)

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Re Delius [1957] 2 W.L.R. 548; [1957] 1 All E.R. 854

Dissemination of high quality musical work—a valid educational charity.—Courts of law are hardly the right places in which to pass artistic judgments, as trials of authors for obscenity have sometimes shown. In the instant case, however, there was no contention from any quarter that the works of Delius were not of exceptional quality. The composer's widow left the residue of her estate on trust to advance her husband's musical works, on a non-profit basis, providing, as an illustration, that it might be used to prepare a complete uniform edition of his scores, or for subsidised public performances of his work. Roxburgh J. held that this was a valid charitable trust. He followed the test laid down by Lord Greene M.R. in *Royal Choral Society* v. *C. I. R.* [1943] 2 All E.R. 101, a case often cited but not included in all the books on the subject, that the raising of the artistic taste of the listener or concert-goer was a form of continued education, not limited to the young. Roxburgh J. pointed out that

the fact that pleasure was also involved did not make any difference. The fact that a single composer was to be honoured was also irrelevant, and here there was the well-known authority of *Re Shakespeare Memorial Trust* [1923] 2 Ch. 398. It is common in English studies for professors to devote their lives to teaching the appreciation of the works of a particular author, and great musicians have also sometimes dwelt on the contributions of some composer to music. The decision is, therefore, in line with academic tradition about the content of education. It would equally apply in the pictorial arts. The cultivated man is an educated man.

(Theobald 339)

Re Shaw [1957] 1 W.L.R. 729; [1957] 1 All E.R. 745

Research into wastage caused by inefficient orthography—not a charity.—The late great Bernard Shaw had particularly strong views on English spelling. Few languages other than English and French have any spelling problems and even French spelling is far less arbitrary than English, in which historical encrustation and a love of tradition lead one to preserve the ghosts of departed sounds. Only the Chinese script leads to more time-waste in mastering the framework of the language, and it is significant that the new China is now abandoning its ideographs and borrowing our Latin alphabet to express phonetic Chinese in writing.

Spelling reform, therefore, seems in itself a very public spirited scheme. Unfortunately, it falls rather outside the field of charity; the connection with the field of education is rather indirect and the propagation of a particular projected alphabet of forty letters is regarded as a political objective, in the best sense, but not as a charity. The authority of a previous decision, *Trustees of Sir G. B. Hunter* (1922) *Trust* v. *C. I. R.* in (1929) 14 Tax Cas. 427, that a trust for simplified spelling was not a charity, made the arguments somewhat academic. The instant case is in line with the general rule that research in itself is not charitable unless its results are disseminated in an educational way. The results of Mr. Shaw's inquiry into the economics of the present alphabet were to be the groundwork for the promotion of a particular type of spelling and not a contribution to education generally. The research was to be "*ad hoc*," "slanted," and not true scholarship. Since the improvement of race relations was held to be no charity in *Re Strakosch* [1949] Ch. 529, it is very difficult to make any claims for a far more controversial and problematic objective.

An interesting further holding of Harman J. was that he could not permit the trustees to use the income of residue for the twenty-one years specified, as if they had a power of appointment. An ineffective trust could not be construed as a power (applying dicta in *Houston* v. *Burns* [1918] A.C. 342), as that would amount to redrawing the will. The present writer has argued that an object trust like that in the instant case might be held good although not charitable provided it was not infected by perpetuity or uncertainty ((1950) 14 Conv.

374; (1953) 17 Conv. 285, 290). There was no risk of perpetuity here, as the period of the trust was limited to twenty-one years from Shaw's death. The learned judge held that there was no alternative to invalidity. It is just arguable that such a trust should have been upheld, since it does not appear to suffer from the vice of uncertainty which affected trusts in cases of vague clauses about benevolence or spiritualism. An institution concerned with serious social studies would be able to guarantee proper use of the money on the research side. This would still leave the problem raised by the promotion of a new type of alphabet, on which it might be held that Shaw's will-power was to control, and not to further the conclusions of pure science. If the two objectives are not severable then it seems right that the whole trust should fail.

(Theobald 345)

Re Goldschmidt [1957] 1 W.L.R. 524; [1957] 1 All E.R. 513

Non-existent institution—cy-près application—general charitable intention.—A sum from residuary personalty was divided among seventeen named institutions with a gift of the balance of residuary personalty to the C. Hospital. One of the institutions, though its name resembled that of several bodies, was not strictly identifiable. Harman J. held that its share fell into residue and went to the C. Hospital. The books generally state that it is easy to spell out a general charitable intention where a residuary gift is made to a number of charities and one other charity which never existed, all the pre-requisites here present. Yet the other cases were distinguished on the ground that there the court had been striving to prevent money meant for a charity going to a non-charity. Here the C. Hospital was clearly a charity and there was no need to distort the words of the will, which in themselves were uncertain. In *Re Harwood* [1936] Ch. 285, the court had been able to interpret the gift to a non-existent charity as if it had been an object trust. This course was equally open to the court here, as the objectives of the testator were clear. With respect, it is not immaterial to the charitably minded which charitable object takes their property. The present bequest was intended for certain clearly defined relief for Jews; the gift over of the balance went to quite a different charity, though chosen by the will. Charity will not be encouraged if the particular intention of the testator is so narrowed as to defeat it. This case would seem to have been perfectly suitable for a *cy-près* application. There is also the risk to be borne in mind, that evidence is not always perfect, and that a body with the precise name used in a will may later make an appearance and prove that it was the body intended to benefit.

(Theobald 356)

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4. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Marshall [1957] 2 W.L.R. 439; [1957] 1 All E.R. 549

Adopted child as "child" or "issue" on construction of will—conflict of laws.—Dr. Morris has raised the question, in his editions of Theobald on *Wills*, whether the status of a "child" as recipient of a legacy is a matter of succession or of matrimonial or personal law. Whereas the 1926 Legitimacy Act makes special provision for conflict of laws problems, there is no corresponding provision in the Adoption Act, 1950, s. 13. In the instant case, Harman J. went out of his way to lay down a clear rule, though it is only a dictum. In his view, the question whether an adopted child comes within the legal meaning of "issue" of the adopter in a will is part of the law of succession. The final conclusion depends on the legal effect of the adoption, whether its proper law converts the adopted child into a natural child in the eyes of the law or not. He declined to follow *Re Wilby* [1956] P. 174.

In the instant case the judge put the illustration of a will of a testator dying domiciled in England, leaving personal property to "the issue of X," X being assumed to be domiciled in Utopia. At the time of the testator's death, Utopian law regarded X's adopted child, Y, as to all intents and purposes equated with natural legitimate children of X. In this school case English law should, as that of the proper forum of construction of the will, apply the law of the potential donee, Utopian law, and treat Y as within the description "the issue of X." It is obvious that greater difficulties could be produced if some of the elements in this illustration were altered, *e.g.*, where the foreign law had a more limited effect on Y's status, or where the property was English land or where the adoption took place somewhere outside the country of the domicile of adopter or adoptee. However, there is something to go on in this decision, and the conflict with *Re Wilby* will some day have to be decided.

(Theobald 282)

Re Ransome [1957] 2 W.L.R. 556; [1957] 1 All E.R. 690

Class gift — vesting postponed — contingent specific bequest — accumulations—problem of intermediate income and early vesting.—There is nothing substantially new in this case but it does provide a fresh authority on a number of points on which rather vintage authorities would have to be relied on. Owing to the way in which the case was argued, the judgment is somewhat negative and roundabout and much of the law is taken for granted. The treatment of the points in Theobald seems quite clear, but some reliance was placed on Jarman (8th ed., at p. 1682), and this latter exposition was disapproved by the court. The facts were, somewhat simplified, that there was a direct gift without intermediate life interest to a class of children who should survive the termination of a period of accumulation of income. The period was to go on until the youngest child of R attained the age of

twenty-one years, when R's surviving children were to take the capital. The accumulation period violated the rule against accumulations (Law of Property Act, 1925, s. 164). R had a son David, when the testatrix died in 1935, and both R and David survived her, but R had re-married and there were as yet no children of the second marriage. There is clear authority that, when a gift is made to a class of children who survive the attainment of majority by the youngest child, all children of the parent are members of the class, *i.e.*, including possible future born children of the second marriage (*Mainwaring* v. *Beevor* (1849) 8 Hare 44; see Theobald, p. 296, n. 26). It was unsuccessfully argued in this case that the court should favour early vesting and give the capital to David, but the learned judge pointed out that the authorities on early vesting were quite different; they were cases where one legatee had an undoubted vested interest and the legatee was asking for the closure of the class, whereas here David had a contingent interest as he might never survive the date of distribution. *Re Manners* [1955] 1 W.L.R. 1096, and a number of older cases were distinguished.

There was then a lengthy argument on the fate of the income. The court held that the accumulation, being *pro tanto* bad under section 164, might only operate for a period of twenty-one years from the death of the testatrix in 1935, this being, in the light of after-knowledge, the longest available period permitted by the statute.

The court then went on to hold that the settlement of shares in the present case was a contingent specific bequest. Although the will operated in 1935, section 175 of the Law of Property Act was not referred to. The section carries intermediate income unless otherwise expressly disposed of by the testator. The accumulation was such a disposition, but as it was partly ineffective, a difficult problem might have arisen. The learned judge, instead, based his decision on a distinction between a contingent gift to an individual, *e.g.*, "to John if he marries," and a contingent gift to a class, and held that no intermediate income passed to any potential member of a class until he took a vested interest. A direction to accumulate excludes intermediate income from being carried by a contingent residuary gift of personalty (see *Re Blake, Berry* v. *Geen* [1938] A.C. 575; *cf. Re Gillett* [1950] Ch. 102; *Re Reade-Revell* [1930] 1 Ch. 52), and the same reasoning might be applied.

Finally, it was argued that intermediate income of a contingent gift of personalty was carried under section 31 of the Trustee Act, 1925, so that David could be paid the income from his majority until he died, or qualified by surviving the date of distribution. But section 31 can be excluded by a contrary intention. The direction to accumulate was obviously such a contrary intention. True the accumulation was frustrated as from 1956, but the Act did not here refer to any contrary effective disposition of income but only to the intention. It is axiomatic that a will must first be construed before any rules of essential validity of its provisions are applied. Section 164 of the Law of Property Act could not be introduced prematurely to modify the intention expressed in the will or to treat a conflicting provision in the will as if it were not there. Hence David failed to get any satisfaction.

(Theobald 165, 295–296, 390)

5. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Boyd v. *Wilton* [1957] 2 W.L.R. 636;
[1957] 2 All E.R. 102, C.A.

Agricultural Holdings Act, 1948—*repairs—notice of landlord's intention to claim—alternative claims—validity of notice.*—A landlord served a notice under section 70 of the Agricultural Holdings Act, 1948, of his intention to make certain claims under that Act. The notice stated that the claims would be made under the conditions of letting, section 57 of the Act and the custom of the country. The tenant contended that the notice was void in that it infringed section 57 (3) (b) of the Act, which provides that compensation shall not be claimed both under a contract of tenancy and under section 57 (1). The Court of Appeal rejected this contention. Section 57, it was held, deals with rights to compensation; not with methods of enforcing rights or questions of procedure. Section 57 (3) means that no one is to have an effective or enforceable claim both under a contract of tenancy and under the Act. There is nothing in the subsection which prohibits a landlord from making alternative claims, although a landlord who puts his case in the alternative must sooner or later elect which alternative he is going to adopt.

It should be noted, however, that the notice in this case clearly made alternative claims, each of which was permitted by the Act. Jenkins L.J. observed that if a landlord were to make cumulative claims, if, that is to say, he intermixed in respect of different items comprised in the same holding claims under the Act and claims under the tenancy agreement, his notice might well be invalid in that it did not specify a claim which the Act allows. But that question did not arise.

Adler v. *Upper Grosvenor Street Investment, Ltd.*
[1957] 1 W.L.R. 227; [1957] 1 All E.R. 229

Covenant not to assign or underlet without consent—validity of express proviso—Landlord and Tenant Act, 1927, *s.* 19 (1) (*a*).—The lease in this case contained a covenant in the usual form against assignment, underletting or parting with possession of the premises without the consent of the landlords, "such consent (subject as hereinafter provided) not to be unreasonably withheld to an assignment or underletting of the said flat as a whole to a respectable and responsible person." But the parties had added an express proviso that "should the tenant desire to assign or underlet the flat he shall before doing so offer in writing to the landlords to surrender the lease on any subsequent quarter day without any consideration and the landlords may accept such offer at any time within twenty-one days from the receipt thereof . . . but shall otherwise be deemed to have rejected it." The landlords refused their consent to an assignment upon the ground (*inter alia*) that the tenant had failed to comply with the proviso. The tenant contended that the proviso was void on the ground

that it infringed section 19 (1) (a) of the Landlord and Tenant Act, 1927, which provides that "notwithstanding any provision to the contrary" every covenant of this nature must be read subject to the statutory proviso that the consent of the landlord is not to be unreasonably withheld. Hilbery J. held that this express proviso did not prevent the operation of the statutory proviso and that it was therefore valid. Section 19, in his view, merely (1) forces in a proviso, and (2) prevents the inclusion in a lease of anything which would prevent the inclusion of that proviso. The effect of the express proviso in this case was not to prevent the operation of the statutory proviso, but to impose a condition precedent to the coming into operation of the whole covenant. He distinguished *Re Smith's Lease* [1951] 1 All E.R. 346 on the ground that the express proviso in that case did curtail the operation of the statutory proviso, after the covenant had come into operation, in that it stated that a refusal on certain grounds, which would otherwise have been unreasonable, should be deemed not to be so. The proviso in the present case, though in form a proviso, was in substance a clear contract, dealing with a step to be taken before the question whether consent should be given or withheld could arise.

Trayfoot v. *Lock* [1957] 1 W.L.R. 351; [1957] 1 All E.R. 423, C.A.

Rent Acts—death of tenant—two applicants for succession to tenancy—wishes of deceased tenant—admissibility.—In this case the son and the stepdaughter of a deceased tenant, both of whom were living with the tenant at the time of his death, wished to succeed to the tenancy under section 12 (1) (g) of the Act of 1920. The landlord's agent awarded the tenancy to the son, whereupon the son paid the rent and the stepdaughter paid him 10s. per week for the accommodation of herself and her husband in the house. The furniture had been left to the son; and the tenant had also in his lifetime signed a document dated June 11, 1955, and addressed to the landlord's agent stating his wish that the son should have the tenancy. In an action by the son (who wished to get married) for possession of the house the Court of Appeal held that although there was evidence from which the registrar could infer that there had been no agreement between the son and the stepdaughter, the document of June 11, 1955, which the registrar rejected, should have been taken into account by him when he was considering to whom the statutory tenancy ought to be awarded. Denning L.J. expressed the view that in cases of this nature the court must consider all the circumstances. In the circumstances of this case, the other factors being very evenly balanced, the wishes of the deceased tenant seemed to be decisive, and oral or documentary evidence of his intention as declared in his lifetime was admissible as being the only means of finding out those wishes.

Hayman v. *Rowlands* [1957] 1 W.L.R. 317; [1957] 1 All E.R. 321 (C.A.)

Rent Acts—order for possession in absence of tenant—application for new trial—exercise of discretion.—The tenant in this case withheld rent from the landlord on the ground (as he alleged) that the premises were out of repair. The landlord claimed possession, and obtained an order for possession in the absence of the tenant, who had made a mistake about the date of the hearing. After the order had been made, the tenant paid the full amount of the rent into court, and made an application for a new trial, which was refused. No reason was given for the refusal in the judge's note, but according to an affidavit of the tenant's solicitor (which was received by the Court of Appeal) the judge stated that he would have reached the same conclusion, even if the case had been reheard and even though the full amount of the rent had been paid into court. The Court of Appeal (Denning, Hodson and Morris L.JJ.) held that a new trial ought to be granted, although the tenant might well have to pay the costs thrown away. If by some oversight or mistake one party does not appear and judgment goes against him, a new trial ought to be ordered, provided that justice can be done by compensating the other party for costs and trouble incurred, and provided also that some defence on the merits (however strong or weak) can be shown. In this case the tenant clearly had a defence on the merits, since in all the circumstances it might not have been reasonable to make an order. In any event, it is most unusual to make an order for possession for non-payment of rent after the full amount has been paid into court.

Yelland v. *Taylor* [1957] 1 W.L.R. 459; [1957] 1 All E.R. 627 (C.A.)

Rent Acts—recovery of possession—reasonableness—exercise of discretion.—The Court of Appeal held in this case that where a landlord gives false evidence in support of a claim for possession of rent-controlled premises on one ground, that is a factor which a county court judge can take into account in deciding whether or not it is reasonable to make an order, even though, but for that false evidence, he would have been prepared to make an order on another ground. The landlord claimed possession on the grounds that (1) the premises had been let furnished; (2) he was in a position to offer suitable alternative accommodation; and (3) he required the premises for his own accommodation and was suffering greater hardship within the meaning of paragraph (h) of the First Schedule to the Act of 1933. The judge found that the alternative accommodation was not suitable, but that the balance of hardship was in favour of the landlord upon the third ground. But he also found that the landlord and certain witnesses had been lying when they said that the house had been let furnished, and he refused to make an order for that reason. It was argued that the landlord's misconduct was beside the point, and that the judge's discretion in these cases is limited to such matters as the relevant circumstances of the parties. But in the

view of Jenkins L.J. (with whom Morris and Sellers L.JJ. agreed) the interests of the parties are plainly relevant and " where the judge finds that a plaintiff landlord has sued a tenant, putting in the forefront a lying claim that the letting is a furnished letting, he is well entitled to hold it in the interests of the tenant, and unreasonable from the tenant's point of view, that having successfully defeated that perjured claim, the tenant should be put in peril on a different ground if the lying plaintiff has a second string to his bow on which he can make out some sort of case."

Villa D'Este Restaurant, Ltd. v. *Burton* [1957] 2 W.L.R. 586; [1957] 1 All E.R. 862 (C.A.)

Rent Tribunal—furnished premises—registration of rent payable during previous tenancy—increase of rent payable during subsequent tenancy at rent previously registered—liability of tenant for increase. —The decision in this case turned upon the true construction of section 2 (3) of the Furnished Houses (Rent Control) Act, 1946, which provides that " Where the rent payable for any premises has been entered in the register in accordance with [section 3], it shall be lawful for the lessor or the lessee or the local authority to refer the case to the tribunal for reconsideration of the rent so entered on the ground of change of circumstances, and . . . the tribunal shall have power to increase the rent payable."

The lease was for five years from Michaelmas, 1954, at a rent approved by the relevant tribunal and registered during the previous tenancy in 1953. Upon an application by the landlord in 1955, the tribunal increased the rent payable for the premises to an amount which exceeded the amount reserved by the lease of 1954. In an action by the landlords for the increased rent, the tenant contended that he was not liable for the increase (save in so far as it related to an increase in rates which he had contracted to pay) on the ground that he could not be compelled to pay more than he had agreed to pay under the terms of his lease. The Court of Appeal (by a majority) held that the tenant was liable for the increase. In the view of Morris and Ormerod L.JJ. section 2 (3) of the Act gives power to rent tribunals, when once a rent has been entered in a register, to reconsider that rent and to approve, reduce or increase the rent payable under the contract. A tribunal has power, in other words, despite the absence of any express statutory authority such as is to be found in section 40 of the Housing Repairs and Rents Act, 1954, to effect a statutory modification in the terms of a contract of tenancy: and any new rent substituted by a tribunal becomes payable under the contract as from the date specified by the tribunal. It would also be strange, in the view of Morris L.J., in a case where the original contractual rent had been limited by section 4 (1) to the rent entered on the register and had not, therefore, been freely negotiated, if Parliament had enacted that that rent could be carried downwards but never upwards. Lord Evershed M.R., however, dissented. There is no express statutory authority to substitute a new rent for a contractual rent: and it is not necessary, in his view, to imply any such authority.

Rent could still be increased under section 2 (3) where there has been a previous reduction by a tribunal: but only up to the original contractual rent. The clue to the problem, in his judgment, is provided by the use of the words " the case " and " reconsideration " in section 2 (3). Even assuming that " the case " means " the question of the rent payable for the particular premises," section 2 (3) calls for a reconsideration of the previous determination of the tribunal with regard to it. Upon an initial reference under section 2 (2) there can only be either approval or reduction: there can be no increase. A first application under section 2 (3) can, therefore, only be (by a lessor) for reconsideration of an original reduction of a contractual rent or (by a lessee) for reconsideration of an original approval. In neither case could the original contractual rent be increased. Upon this view a rent could only be increased above a contractual rent if it had previously been increased under section 2 (3) after an original reduction under section 2 (2), a result which would be capricious and highly unreasonable.

Leave to appeal to the House of Lords was granted.

R. v. *Battersea, Wandsworth, Mitcham and Wimbledon Rent Tribunal, ex p. Ambalal Parikh* [1957] 1 W.L.R. 410; [1957] 1 All E.R. 352

Rent Tribunal—furnished premises—reference by paying guest or lodger—jurisdiction.—A paying guest or lodger may in certain circumstances make an application to a Rent Tribunal for a reduction of rent under section 2 (1) of the Furnished Houses (Rent Control) Act, 1946, even though the " landlord " retains a right of access to the premises. The applicant in this case entered into an agreement for the occupation of a furnished room on the upper floor of a house, in which she was described as " a paying guest at an inclusive weekly charge of £2 10s." She had the right, under the agreement, to use other rooms in the house, including the bathroom, kitchen and dining room: and it was also agreed that the " landlord " should have access to the room at all times. Section 2 (1) of the Act of 1946 provides that " where a contract has . . . been entered into whereby one person . . . grants to another person . . . the right to occupy as a residence a house or part of a house . . . in consideration of a rent which includes payment for the use of furniture or for services, whether or not, in the case of such a contract with regard to part of a house, the lessee is entitled, in addition to exclusive occupation thereof, to the use in common with any other person of other rooms or accommodation in the house, it shall be lawful for either party to the contract or for the local authority to refer the contract to the tribunal for the district, . . . " Upon a motion for an order of certiorari to quash a determination of the relevant tribunal which reduced the applicant's rent and gave her security of tenure for three months a Divisional Court of the Queen's Bench Division held that Rent Tribunals have jurisdiction over all contracts for the occupation of a house or part of a house, provided that in the case of part of a house such occupation is exclusive. It is not necessary that the occupant should have possession.

An exclusive right of occupation as a residence is enough: and an exclusive right of occupation is not destroyed, when a landlord has handed over the furniture and the keys, by the reservation of a right of access from time to time.

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6. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*:—Where a case is not reported in the general series of law reports, it is cited from *Annotated Tax Cases* (A.T.C.) and *Taxation Reports* (T.R.).)

Hannay v. *C. I. R.* [1956] T.R. 461 (Ct. of Sess.)

Surtax—settlement on children—resulting trust

Statutory provisions: Finance Act, 1938, s. 38 (3) (now Income Tax Act, 1952, s. 405 (2)).

Point: This is a short and instructive case. Conveyancers are used to the somewhat delayed difficulties which arise between beneficiaries when the draftsmen of settlements fail to cover all possibilities or all contingencies. The Revenue are, however, more immediately active than beneficiaries and the gap in a draft may well cause immediate reaction for tax purposes. Undisposed-of income results to the settlor and an interest in the settlor is normally a cause of failure to secure any taxation advantages where a settlement for the benefit of children of the settlor is concerned. In consequence, in such a settlement, it is frequently advantageous to add a clause, *ex abundante cautela*, to exclude the possibility of a resulting trust should any part of the income or capital prove not to be otherwise disposed of.

Facts and decision: The appellant and his wife made a settlement in favour of their children and charities. The relevant trusts were to pay the whole of the trust income to charity until the first child attained twenty-one, which he did on April 16, 1952. When a child attained twenty-one, he was to receive an annuity of £250 a year. When the youngest child attained twenty-five or married, whichever was the earlier, the capital was to be divided as to £60,000 between the children and as to the remainder amongst charities.

Held: For the year 1952–1953, the income of £250 paid to the child that had attained twenty-one fell to be treated as income of the settlor under the Income Tax Act, 1952, s. 397, the child not having attained twenty-one on the first day of that year. The remainder of the income also fell to be treated as income of the settlor, for it was undisposed of.

C. I. R. v. *Thornton Kelley & Co., Ltd.* [1957] 1 W.L.R. 482; [1957] 1 All E.R. 650; [1957] T.R. 25 (Ch.D.)

Surtax direction—income available for distribution—bonus issue

Statutory provisions: Finance Act, 1922, s. 21 (1) (now Income Tax Act, 1952, s. 246 (2) and (3)).

Point: The determining factor upon which the Special Commissioners make a surtax direction in respect of any period, under the Income Tax Act, 1952, s. 245, is that the company has not, within a reasonable time after the end of that period, distributed to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by them of their total income for the purposes of surtax, a reasonable part of its actual income for that period. Before deciding upon the presence of this factor it is essential to know what income was available for distribution. Certain expenditure or application of income is artificially treated as being income notionally available for distribution by the Income Tax Act, 1952, s. 246 (2). In particular, by paragraph (a) (iv) of that subsection, sums applied in redemption or repayment of any share capital issued otherwise than for adequate consideration are regarded as still available. The inadequacy of consideration is defined in paragraph (a) of section 246 (3), and occurs when the issue was for consideration, the value of which to the company is substantially less than the amount of the capital. Of such a nature is the "bonus issue." Although it is clear from the decision in *C. I. R.* v. *Blott* [1921] 2 A.C. 171 that when a company capitalises its profits and makes a bonus issue of shares the company gets some benefit which is sufficient consideration to support the allotment, nevertheless such benefit is not adequate consideration within the meaning of section 246 (3) (a). In consequence, sums applied in redemption of shares issued as fully paid up on a capitalisation will still be available for distribution should a surtax direction be considered.

Facts and decision: The company's original share capital of £10,000 divided into 10,000 ordinary shares of £1 each was increased by a further 10,000 which were issued by way of capitalisation to the holders of the previous shares in 1920. The capital was reduced to £10,000 in 1951, but in 1952, after a further revaluation of its fixed assets, a second capitalisation was carried out and another 10,000 new ordinary shares of £1 each allotted to the holders of the existing shares. The company had a profit, after provision for tax in the year ended June 30, 1951, of £13,690, and for the following year, £8,457. In each year it distributed, by way of dividend, just over £500. The Special Commissioners considered the company's position for the years 1950–1951 and 1951–1952, and the company contended that the £10,000 applied in redeeming the bonus shares was not still available for distribution.

Held: (by Wynn-Parry J.) that the bonus shares having not been issued for adequate consideration, the sum applied in redeeming them was still available for distribution. On that footing it was impossible to hold that the company had made a reasonable distribution of its actual income.

C. I. R. v. *South Georgia Co., Ltd.* [1956] T.R. 465 (Ct. of Sess.)

Profits tax distribution charge—trading loss

Statutory provisions: Finance Act, 1947, s. 34 (2).

Point: Just as profits tax on undistributed income is chargeable only once on the same income, even though it passes through successive hands, so the distribution charge is only exacted once. Income that has once borne profits tax in the hands of one company is "franked" when it reaches the hands of a second company. Thus, when estimating the net relevant distributions to proprietors for the purpose of making a distribution charge, franked investment income is, in effect, left out of account in so far as it is reflected in the distributions made. Profits may mean, for profits tax purposes, profits including or excluding franked investment income, and profits, by hypothesis, are a positive and never a negative quantity. Hence, if a company with a trading loss has franked investment income, its profits excluding franked investment income may be nil but cannot be a minus quantity.

Facts and decision: A whaling company incurred a trading loss of £602,000 and received franked investment income of £272,000 in the same year in which year it distributed £181,000 by way of dividend. The Revenue sought to make a distribution charge on the company in respect of £181,000 arguing that £272,000 deducted from the loss of £602,000 left a profit of minus £330,000, that as the distributions of £181,000 were greater than this negative quantity, a distribution charge should be made.

Held: That the profits of the company excluding franked investment income were nil. The gross relevant distributions were £181,000. The profits including franked investment income were £272,000 and therefore exceeded the gross relevant distributions of £181,000. Hence, the net relevant distributions as defined by the Finance Act, 1947, s. 34 (2), proviso, were nil. The word "profits" in that subsection refers to trading profits and not to any franked investment income. Any other result would produce the peculiar anomaly that if on the figures in this case there had been a profit of £1 rather than a loss of £600,000, there would have been no distribution charge but with a loss of £600,000 there would have been a distribution charge. Profits tax is not a losses tax.

Re Hodge's Policy, Hodge v. *C. I. R.* [1957] 2 W.L.R. 787; [1957] 2 All E.R. 219; [1957] T.R. 59 (Ch.D.)

Estate duty—policy kept up for donee—property dutiable

Statutory provisions: Finance Act, 1894, s. 2 (1) (c); Customs and Inland Revenue Act, 1889, s. 11 (1).

Point: Estate duty legislation produces strange anomalies and none more curious than those found in the somewhat arbitrary charges on moneys payable under policies of assurance. One method by which such money may be dutiable is where it is received under a policy

of assurance (1) effected by the deceased on his own life, (2) wholly kept up by him, and (3) so kept up for the benefit of a donee. This claim for duty imposed by the Customs and Inland Revenue Act, 1889, s. 11 (1), incorporated in the Finance Act, 1894, s. 2 (1) (c), is only valid if each of these three conditions is satisfied. Keeping up means paying the premiums as they fall due, but payment in commutation of future premiums is sufficient as in *Re Oakes Settlement* [1951] Ch. 156. The present case establishes the further point that the premiums need not continue until the maturity of the policy, so that although nothing has been payable for many years on a policy absolutely vested in someone other than the deceased, nevertheless duty may be payable on the death. There is thus established a form of gift which remains dutiable outside the "five-year period." Any donee of a policy which is fully paid due to contribution by the donor subsequent to the gift should thus consider taking action now to prevent this latent charge arising. Further, the single premium policy in favour of a donee which has hitherto been regarded as not dutiable, now depends for its exemption solely upon the somewhat slender thread of Lord Wright's *obiter dictum* in *Barclays Bank, Ltd.* v. *Att.-Gen.* [1944] A.C. 372 at p. 379, where he suggested that payment of a single premium was not keeping up in any sense, but merely an establishment of the policy.

So far as the amount of the property dutiable is concerned the fact that the policy holder is indebted to the insurance company and has mortgaged the policy to secure the debt cannot affect the "money received." The circumstance that the mortgagee is the insurance company itself is merely fortuitous and does not affect the receipt by the policy holder.

Facts and decision: The deceased, having effected a policy on his own life, assigned it to trustees in 1913, in trust for his son on attaining the age of twenty-five years, absolutely. Premiums on the policy in each year up to 1916, were paid by the assured, the policy then being fully paid up. The son attained the age of twenty-five in 1938, but previously with the concurrence of his father had mortgaged the policy to the insurance company for a loan of £5,000. The father died in 1950, and the Inland Revenue claimed estate duty on the gross amount payable under the policy, some £16,000. The son contended first that the policy moneys were not dutiable and secondly that if dutiable should be reduced in amount by the sum of £5,000 owing on the mortgage.

Held (by Harman J.) that the policy moneys were dutiable, the policy having been wholly kept up by the father although no premiums had been payable for some thirty-four years prior to the death of the father. Further, the money received under the policy was the whole policy moneys notwithstanding the fact that it had been depleted by the mortgage transaction.

7. *PLANNING CASES*

By T. A. Blanco White, Barrister-at-Law

Francis v. *Yiewsley and West Drayton U. D. C.*
[1957] 2 W.L.R. 627; [1957] 1 All E.R. 825

Enforcement notice— validity—time for taking objections.—An enforcement notice was served on the plaintiff in this case for "carrying out development without permission." In fact, he had had permission, but for a limited period which had expired. Consequently, the notice was bad. The plaintiff, however, did not appeal against it to a court of summary jurisdiction; instead, he waited until more than four years had elapsed since the permission expired (*cf.* s. 23 (1) of the Town and Country Planning Act, 1947, as amended in 1951) and then sued for a declaration that the notice was ineffective. The question was: Can the notice be challenged by such an action, where the defect is one that could have been the subject of appeal to the justices?

Held: That it can: notwithstanding that the invalidity cannot be taken by way of defence to a prosecution for disobedience to it, the High Court still has a jurisdiction. The next question, no doubt, is what happens if the defendant to a prosecution in such a case replies by suing for a declaration that the notice is invalid: what should the justices hearing the prosecution do then? Adjourn the case, perhaps?

Richardson v. *Minister of Housing, etc.* (1957) 8 P. & C.R. 29

Compulsory purchase—order invalid—relief.—This case raised a pure point of practice: if a compulsory purchase order, confirmed by the Minister, is held invalid by the court on the ground that special parliamentary procedure ought to have been followed and was not, what relief should the court grant: to quash the order, or to suspend it whilst the Minister goes through the formality of special parliamentary procedure? In the event, the order was quashed. After all, both the local authority concerned and the Minister himself might change their minds, now that more of the facts were before them.

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8. *MISCELLANEOUS*

Hall v. *Meyrick* [1957] 2 W.L.R. 458; [1957] 1 All E.R. 208

Solicitor — negligence — duty to testator regarding prospective marriage—loss to widow.—The plaintiff, a widow with four children, and the testator, accompanied by one of the plaintiff's sons, consulted the defendant, a solicitor, and each gave instructions for the preparation of a will in favour of the other. It was found as a fact that

joint instructions were not given. During the course of the interview the son said: "Why don't you two get married?" to which the plaintiff replied, "We will one day. When we move to the country. We'll have to get married as everyone knows everyone else's business." Nearly a year later the plaintiff and the testator married. Nearly two years after that the plaintiff consulted the defendant again and he drew a new will. At no time did he advise the plaintiff or the testator that their original wills had been revoked by marriage.

Ashworth J. held, (1) that the defendant was not in breach of duty in not advising the plaintiff or the testator that their wills had been revoked by marriage, either when he heard of the marriage, or when he drew the plaintiff's second will; but (2) that he was in breach of a duty owed by him to his client, the plaintiff, in that he failed to advise her that if she married the testator the wills which were being prepared *for him* and for her would be revoked. He went on to point out that *Groom* v. *Crocker* [1939] 1 K.B. 194 decided that a claim against a solicitor for negligence is in effect a claim for damages for breach of contract. He awarded the plaintiff damages based on the difference between the plaintiff's rights under the testator's will and her rights on his intestacy, making adjustment for contingencies.

Whether the rather casual conversation about marriage should be regarded as sufficient to bring home to the average solicitor that it was seriously contemplated is a matter on which, no doubt, different opinions may be held, but what is rather disquieting is not merely the suggestion, but the definite decision, that a solicitor is under an obligation to disclose to a testatrix that a will prepared for a person she intends to marry will be revoked on marriage.

County Laboratories, Ltd. v. *J. Mindel, Ltd.*
[1957] 2 W.L.R. 541; [1957] 1 All E.R. 806, 851

Restrictive trade practices—conditions as to resale prices—notice of condition.—By the Restrictive Trade Practices Act, 1956, s. 25 (1), where a supplier sells goods subject to a condition as to the price at which they may be resold, that condition may be enforced against third parties who subsequently acquire the goods with notice of the condition, subject to certain qualifications. This provision took effect on November 2, 1956. The defendants acquired some goods which had been manufactured by the plaintiff suppliers, and they knew of the condition fixing the retail price imposed by the plaintiffs, but they said they did not know that the goods in question had been manufactured after November 2. Harman J. held that in those circumstances the plaintiffs were not entitled to an injunction. The actual decision is of transitory interest, but the *ratio decidendi* is important. The equitable doctrine of constructive notice has no place in commercial matters and, consistently with authority, the learned judge held: "Taking with notice, I think, means 'taking with express knowledge,' and not 'being put on inquiry and being therefore fixed with what would have been ascertained if the inquiry had been pushed to its reasonable limit'."

THE LIBRARY

Contracts and Conditions of Sale of Land. 2nd ed. By E. O. Walford, ll.d., Solicitor. Sweet & Maxwell, Ltd. xxxix, 340 and (index) 11 pp. (£3 15s.)

Dr. Walford needs no introduction to readers of the *Conveyancer.* His views on conveyancing matters always command respect, particularly as they are always set against a background of practical experience. In the realm of contracts and conditions of sale of land, it is surprising how poorly the practitioner is catered for, and the second edition of Dr. Walford's book is accordingly particularly welcome. There have been considerable changes in the new edition. Instead of writing merely round the Law Society's Conditions of Sale, the main text is on conditions of sale generally. In the appendices, the Law Society's Conditions of Sale, the National Conditions of Sale and the Statutory Form of Conditions of Sale are set out with a commentary. Whether this is the ideal method of approach is a matter of opinion, for the same point may be dealt with in three different parts of the book.

It is probable that the most difficult question facing practitioners is rescission on default. A vendor of an ordinary dwelling-house expects to complete the sale, say, four weeks after contract—that is usual, and normally there is no difficulty. He does not wish to make time of the essence, and the purchaser's solicitor would not agree to it except in very special circumstances, but when the time for completion is up the vendor wishes to know precisely where he stands: he has his own arrangements to make. Apparently, under both the Law Society's Conditions (No. 36) and the National (No. 23), the only person who can tell the vendor precisely when he can treat the contract as at an end is the court. If the purchaser says he cannot complete that is not enough: *Thorpe* v. *Fasey* [1949] Ch. 649. Although the vendor can serve his notice to complete when the completion date is passed under either set of conditions, the phrase "at least —— days' notice" has been construed to mean a notice giving sufficient days in the opinion of the court to complete: *Pedigree Stock Farm* case (1950) 155 E.G. 66; *Re Engall's Agreement* [1953] 1 W.L.R. 977 (incidentally, not mentioned by Dr. Walford); *Re Barr's Contract* [1956] 1 W.L.R. 198. Dr. Walford, apparently, regards this as satisfactory (p. 315), though he does stigmatise the idea (derived from the last-mentioned case) that a purchaser must be given time to complete a proposed sub-sale as novel (p. 335). Although we regret Dr. Walford's attitude on this particular point and prefer the more helpful approach of the common law judge in *Phillips* v. *Lamdin* [1949] 2 K.B. 33, on other subjects, particularly on the question of title to the freehold reversion, the author strongly argues against the orthodox practice without forgetting the difficulties facing the practitioner.

Even the most experienced conveyancer will find there are things which he did not know, and every practitioner will find the book a useful commentary on standard conditions of sale. Every busy practitioner has queries from time to time on conditions of sale. When he turns up the text of the conditions would he not welcome a note by someone with knowledge and practical experience? Sometimes the reader may feel the guidance is not really complete enough, as, for example, in the case of outgoings and when time is of the essence, but on other occasions he will be grateful for helpful criticism, *e.g.,* of the unsatisfactory condition 5 (ii) of the National Conditions. In short, this is a really useful and practical book: where it does not give the answer, it at least points a finger in the direction of the solution.

E. F. G.

The Sale of Flats. By EDWARD F. GEORGE, LL.B., Solicitor. Sweet & Maxwell, Ltd. xi and 197 pp. (£1 5s.)

To the traditional conveyancer, nurtured on the maxim *cujus est solum, ejus est ad coelum et ad inferos*, the modern trend towards horizontal conveyancing savours of heresy, although it has long been recognised that there is no theoretical objection to separate ownership of different strata of land, and the Law of Property Act, 1925, definition of "land" includes "parts of buildings (whether the division is horizontal, vertical or made in any other way)." The objections to horizontal conveyancing spring from the complications which inevitably arise, but economic and social pressures have combined to create a demand for flat-ownership and the legal profession must be prepared to point out the dangers, to assess such risks as are to be faced, and to suggest practical solutions. In future, Mr. George's admirable book will be an indispensable adjunct for the conveyancer advising on the sale of flats, whether by way of freehold conveyances or long leases. In his lucid and readable style, Mr. George charts the pitfalls and gives a comprehensive exposition of the law and current practice on all aspects of the subject, from the incidence of income tax to the enforcement of covenants, from rent control to rentcharges and from registration of title to building finance. Over half the book is devoted to precedents covering most of the documents which will normally be required in connection with the alternative schemes considered in the text. Mr. C. Bernard Brown's useful article on "The Economics of the Conversion of Old Buildings," is reprinted in an Appendix, although perhaps his criticism of flat sales could have been retained with a disclaimer, as in (1956) 20 Conv.(N.S.), pp. 138–139.

The conservative real property lawyer might wish that Mr. George had prefaced his survey with a brief outline of the history of horizontal severance of ownership in land, with a consideration of the effect of *Corbet* v. *Hill* (1870) L.R. 9 Eq. 671, and similar cases, on the ownership of the subsoil and upper air when flats are sold off; and that he had dealt in more detail with the implications on flat conveyancing of the possibility of destruction of a block of flats—a subject on which, the author admits, there is "singularly little authority." There is an unfortunate omission of a line of print towards the end of para. 3 on p. 38—this should apparently read "showing with sufficient accuracy the land affected by the application, it is not necessary to provide a plan . . ." (see (1955) 19 Conv.(N.S.) p. 8).

These are, however, comparatively minor matters and do not affect the view that this book will be invaluable to practical conveyancers and to all who have to face the problems of flat sales and conversions—estate agents, building developers and (dare one hope?) building society officers—combining as it does in one compact volume an elucidation of the various complications which arise in so many branches of the law. The author and publishers are to be congratulated on a book that fulfils a real need.

R. G. R.

We have also received:—

The Copyright Act, 1956. By D. H. MERVYN JONES, M.C., LL.B., Barrister-at-Law. Sweet & Maxwell, Ltd. xii, 125 and (index) 9 pp. (£1 1s.)

The Copyright Act, 1956, made radical changes in the law and this short work consists of an annotated copy of the Act preceded by a short introduction which has already appeared in the *Conveyancer* (Vol. 21, 25).

Mixed Charities. By A. H. Withers, Barrister-at-Law, with a modern commentary by Spencer G. Maurice, Barrister-at-Law. The Solicitors' Law Stationery Society, Ltd. 24 pp. (4s.)

The Discharge and Modification of Restrictive Covenants. By G. H. Newsom, Q.C. Sweet & Maxwell, Ltd. lxv, 411 and (index) 4 pp. (£2 5s.)

Business Lettings. By Professor Dennis Lloyd, M.A., LL.B., Barrister-at-Law, and John Montgomerie, B.A., Barrister-at-Law. Butterworth & Co., Ltd. liii and 374 pp. (£2 10s.)

CORRESPONDENCE

To the Editor,
The Conveyancer and Property Lawyer

Discharge of Restrictive Covenants

Dear Sir,

On page 501 of Volume 20 Mr. G. H. Newsom, Q.C., in his article on the "Discharge and Modification of Capital Restrictive Covenants," says that in the application made by Truman, Hanbury, Buxton & Company Limited it was sought to rely on paragraph (b) but that the submission failed for want of any evidence to support it.

I was the solicitor instructing Mr. G. H. Squibb, Q.C., in this application for Messrs. Trumans and I cannot agree with this statement. In fact, on page 500 of the same Volume Mr. Newsom correctly refers to the fact that shops had been erected fronting London Road in breach of the restrictive covenant. He may have overlooked that one of these shops (which was, in fact, opposite the applicant's site) was an off-licence and there was therefore a breach of the first covenant. The restrictive covenant relating to shops was the second covenant.

It was therefore submitted by Mr. Squibb that the owners of properties on the building estate must have impliedly agreed to the breach of covenant by allowing the shops to be erected fronting London Road and in particular the carrying on of an off-licence business in one of them.

I thought this should be mentioned as I can appreciate that Mr. Newsom would probably not have time to read the whole of the evidence given before the Lands Tribunal and no doubt would be interested to know that, in fact, the Tribunal did have some evidence under paragraph (b) but apparently thought it insufficient to discharge the onus.

Yours faithfully,
H. Maxwell Lewis.

Southend-on-Sea, April 8, 1957

[We have shown this letter to Mr. Newsom who tells us that he read it with much interest. The position, as he sees it, is that, while he was inaccurate in stating that the submission failed for want of any evidence to support it, the submission did in fact fail for want of sufficient evidence to support it. *Ed.*]